No. 87-1055-CFX
Status: GRANTED

Title: Elisa Chan, et al., Petitioners
v.
Korean Air Lines, Ltd.

Docketed:
December 23, 1987

Court: United States Court of Appeals for the District of Columbia Circuit

See also:
87-750

Counsel for petitioner: Sincoff,Milton G.

Counsel for respondent: Tompkins Jr.,George N.

Entry	Date	Note	Proceedings and Orders
1	Dec 23 1987	G	Petition for writ of certiorari filed.
2	Jan 12 1988		Brief of respondent Korean Air Lines in opposition filed.
3	Jan 13 1988		DISTRIBUTED. February 19, 1988
4	Feb 8 1988		REDISTRIBUTED. February 19, 1988
5	Mar 16 1988		REDISTRIBUTED. April 1, 1988
6	Apr 4 1988		Petition GRANTED.
			**********
8	Apr 15 1988		Order extending time to file brief of petitioner on the merits until June 9, 1988.
9	Jun 2 1988		Order further extending time to file brief of petitioner on the merits until June 18, 1988.
10	Jun 17 1988		Joint appendix filed.
11	Jun 17 1988		Brief of petitioners Elisa Chan, et al. filed.
12	Jun 17 1988		Brief amicus curiae of United States filed.
14	Jun 22 1988		Order extending time to file brief of respondent on the merits until August 20, 1988.
16	Jul 1 1988	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
15	Jul 20 1988		Record filed.
		*	Certified original record received.
17	Aug 19 1988		Brief of respondent Korean Air Lines filed.
18	Sep 13 1988		CIRCULATED.
19	Sep 15 1988		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
20	Sep 30 1988		Set for argument. Wednesday, December 7, 1988. (1st case) (1 hr.)
21	Dec 1 1988		Lodging from the respondent received and circulated.
22	Dec 7 1988		ARGUED.

87 1055

No. _____

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

IN RE KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1983, MDL 565

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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QUESTION PRESENTED FOR REVIEW

In actions governed by the Warsaw Convention Treaty and Montreal Agreement, may the airline assert the $75,000 damage limitation where it failed to give the required warning of that limitation to its passengers?[1]

LIST OF PARTIES TO THE PROCEEDING[2]

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1 If certiorari is granted, the Court may wish to address an additional question to guide lower courts in the future: following a transfer for pretrial proceedings only under 28 U.S.C. § 1407, is the transferee court required to apply the substantive federal law existing in the transferor court?

2 The following plaintiffs are parties to this proceeding: Elisa Chan, Roberta Cruz, Hans Ephraimson-Abt, Willie James, Dorothy Jones, Michael D. Jones, Betty B. S. Lim, In Jig Lin, Marsha Maikovich, Louella Nassief, Kyung Hwa Park, Barbara Swift, Christina Ting, David WuDunn, Sung Wha Yoo and Marjorie Zicherman. After the motion below was filed, additional actions were commenced, are not formally included in this appeal, but involve the same issue. The plaintiffs in those actions are: Robert Boyar, Evelyn Chauncey, William Cunningham, Lenore Lebow, Katherine McDonald, William Stevens and Terry Weng. The defendant is Korean Air Lines, Ltd.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

IN RE KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1983, MDL 565

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (App. A, *infra*, pp. A-1 to A-66) is reported at 829 F.2d 1171 (D.C. Cir. 1987). It adopted the first district court opinion (App. A, *infra*, pp. A-12 to A-44) reported at 664 F. Supp. 1463 (D.D.C. 1985). The second district court opinion (App. A, *infra*, pp. A-67 to A-70) is reported at 664 F. Supp. 1488 (D.D.C. 1987).

JURISDICTION

The judgment of the Court of Appeals (App. A, *infra*, A-71) was entered on September 25, 1987. By order dated November 16, 1987 (App. A, *infra*, p. A-73), the Court of Appeals denied a petition for rehearing *en banc*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PROVISIONS OF LAW INVOLVED

This case involves the Warsaw Convention Treaty,[3] the Montreal Agreement[4] and two Federal Aviation Regulations.[5] Their pertinent provisions are set forth in App. B, *infra*.

STATEMENT OF THE CASE

Petitioners are the surviving family members and estate representatives of eighteen passengers killed in the Korean Air Lines (KAL) catastrophe of September 1, 1983. KAL flight 7 departed from Kennedy Airport, New York bound for Seoul, Korea. Instead of following its prescribed and safe routing over international waters, the pilots flew the plane more than three hundred miles off course into the airspace of the Soviet Union. The KAL plane was fired upon by a Soviet military fighter aircraft and crashed, killing all 269 aboard.[6]

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3 A Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* 49 U.S.C. § 1502 note.

4 Agreement Relating to Liability Limitations of the Warsaw Convention and Hague Protocol, Agreement CAB 18900, Approved by Executive Order E-23680, May 13, 1966 (Docket 17325), 31 Fed. Reg. 7302 (1966), *reprinted in* Civil Aeronautics Board, *Aeronautical Statutes and Related Material* 515-16 (1974).

5 14 C.F.R. § 221.175(a); 14 C.F.R. § 213.7.

6 Five years earlier, another KAL passenger jet entered Soviet airspace on a flight from Paris to Seoul, was fired upon and crash landed in Siberia.

The damage limitation warning. Each of the cases are governed by the Warsaw Convention and the Montreal Agreement, which KAL signed in 1969. Pursuant to 14 C.F.R. § 213.7, foreign airlines must sign the Agreement as a condition of their permit to operate in the United States. While Article 22 of the Warsaw Convention imposed a damage limitation of 125,000 gold francs (approximately $8,300)[7], the Montreal Agreement raised the limitation to $75,000. Article 3 of the Convention required that the airline deliver a ticket to the passenger containing a statement giving notice of the limitation. The Montreal Agreement and Federal Aviation Regulation 14 C.F.R. § 221.175(a) specify that the Article 3 notice be printed in at least 10 point type.

KAL admitted that it breached its Agreement and violated the regulation by delivering warnings to the petitioners' passengers in smaller 8 point type.

Prior proceedings. Wrongful death actions were commenced against Korean Air Lines in various federal district courts.[8] Federal court jurisdiction in the actions was based on 28 U.S.C. § 1331, by virtue of the Warsaw Convention Treaty[9], and 28 U.S.C. § 1332.

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7 This Court has previously upheld the Civil Aeronautics Board regulation which converted the Convention's damage limitation into dollars by using the last official price of gold. *Trans World Airlines v. Franklin Mint*, 466 U.S. 243 (1984).

8 Of the seventeen actions for the deaths of eighteen passengers involved in this petition, eleven were filed in the Southern and Eastern Districts of New York, three in the Eastern District of Michigan, two in the District for the District of Columbia and one in the District of Massachusetts.

9 In *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979), the Second

Despite the opposition of those plaintiffs who commenced suits in New York, the Judicial Panel on Multidistrict Litigation granted KAL's 28 U.S.C. § 1407 motion to transfer all cases arising out of the disaster to the District of Columbia for pretrial discovery proceedings. *In re Korean Air Lines Disaster*, 575 F. Supp. 342 (J.P.M.L. 1983).

On February 15, 1984, plaintiffs moved for partial summary judgment declaring that KAL was liable for actual damages, having forfeited the $75,000 damage limitation of Warsaw/Montreal by delivering tickets with small print warnings less than the required minimum.

On July 25, 1985, the district court rendered its memorandum and order denying plaintiffs' motion (App. A, *infra*, A-12 to A-44). The issue was certified for appeal and leave to appeal was granted pursuant to 28 U.S.C. § 1292(b).

Following oral argument, the Court of Appeals remanded the appeal for further findings on the issue of whether the district court was bound to apply the decisions of the Court of Appeals for the Second Circuit in those actions originally filed in New York and transferred to the District of Columbia for pretrial proceedings. On May 7, 1987, the district court ruled that it was not bound by Second Circuit precedent in those cases (App. A, *infra*, pp. A-67 to A-70).

On September 25, 1987, the District of Columbia Circuit rendered its opinion (App. A, *infra*, pp. A-1 to A-66) and judgment (App. A, *infra*, p. A-71) affirming the district court. Plaintiffs petition this Court for a writ of certiorari.

Circuit held that the Warsaw Convention created federal question jurisdiction.

ARGUMENT

Certiorari should be granted to resolve a conflict among the federal appellate courts in the interpretation of the Warsaw Convention Treaty and Montreal Agreement created by *Korean Air Lines Disaster*.

The Circuit Court below expressly acknowledged the need for Supreme Court review herein, stating that this is an appeal "meriting attention from Higher Authority", and "that the proper interpretation of the Convention and Agreement, as well as the scope of the transferee court's interpretive authority in a case such as this one, are matters in need of definitive resolution for our national court system". App. A, *infra*, pp. A-6, A-11; 829 F.2d at 1174, 1176.

This Court has previously granted certiorari on the same Warsaw notice issue but its determination did not create binding precedent. By an equally divided panel, this Court affirmed the Second Circuit's holding that an airline lost the limitation by giving a notice in inadequate small print. *Lisi v. Alitalia*, 390 U.S. 455 (1968), *aff'g by an equally divided Court*, 370 F.2d 508 (2d Cir. 1966).

Korean Air Lines Disaster departed from a previously unbroken line of eight appellate decisions during the past two decades which held that the Convention requires delivery of an adequate warning to a passenger before the airline may benefit from Warsaw's limitation. And *Korean Air Lines Disaster* upset the minimum 10 point type print standard for the Warsaw notice established by the Executive Branch through regulation and the Montreal Agreement.

The Second Circuit and recently the Fifth Circuit issued decisions squarely in point contrary to *Korean Air Lines Disaster. In re Air Crash Disaster at Warsaw, Poland*, 705 F.2d 85 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983) (hereinafter *Polish Airlines*); *In re Air Crash Disaster Near New Orleans, Louisiana*, 789 F.2d 1092, 1102 (5th Cir.), *reh'g granted*, 795 F.2d 381 (5th Cir. 1986), *reinstated*, 821 F.2d 1147, 1171 (5th Cir. 1987) (*en banc*) (hereinafter *New Orleans Disaster*). *Polish Airlines* and *New Orleans Disaster* held that airlines forfeited the limitation where they delivered ticket warnings printed in smaller than the minimum permissible size.

The issue raised is an important one which governs the transportation of thousands of international passengers each day. The need for this Court to address this conflict is particularly compelling because eleven of the seventeen cases should be returned to New York district courts at the conclusion of pretrial proceedings. If this Court does not decide the issue, the New York federal courts would be faced with the Second Circuit precedent in *Polish Airlines* and *Lisi v. Alitalia* and the contrary ruling of the District of Columbia Circuit.

I

CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS ON THE PROPER INTERPRETATION OF THE WARSAW CONVENTION AND MONTREAL AGREEMENT

A. The need for certiorari is substantial and was urged by both courts below

While this Court's affirmance of *Lisi v. Alitalia*, 390 U.S. 455 (1968), *aff'g by an equally divided Court*, 370 F.2d 508 (2d Cir. 1966), was by an equally divided panel and did not create a binding precedent, *Lisi* has been uniformly followed with one exception: the decision below. *Korean Air Lines Disaster* is the only dissent to a long settled area of law.

Both the court of appeals and the district court below expressed the need for Supreme Court review of the Warsaw/Montreal issue. App. A, *infra*, p. A-11; 829 F.2d at 1176; App. A, *infra*, p. A-70; 664 F. Supp. at 1490 ("[T]he Supreme Court is available to finally decide the question after an application for certiorari. This should be the course of the present litigation.").

B. *Korean Air Lines Disaster* is contrary to the Warsaw Convention and eight appellate decisions which hold that adequate warning to the passenger is required as a *quid pro quo* of the damage limitation

Article 3 of the Warsaw Convention provides that "the carrier must deliver a passenger ticket which shall contain

. . . [a] statement that the transportation is subject to the rules relating to liability established by this convention." The Convention's central liability rule is the damage limitation of Article 22, which provides that "the liability of the carrier is limited to the sum of 125,000 francs." Failure to deliver the Warsaw ticket results in the forfeiture of the limitation under Article 3: "if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability."

Except for *Korean Air Lines Disaster*, there is complete unanimity among all United States courts that Article 3 of the Warsaw Convention requires delivery of a ticket with adequate warning of the damage limitation as a condition for the airline to obtain the limitation. *Lisi v. Alitalia*, 390 U.S. 455 (1968), *aff'g mem. by an equally divided Court*, 370 F.2d 508 (2d Cir. 1966); *In re Air Crash Disaster Near New Orleans, Louisiana*, 789 F.2d 1092 (5th Cir. 1986), *aff'd in relevant part*, 821 F.2d 1147 (1987) (*en banc*); *In re Air Crash Disaster at Warsaw Poland*, 705 F.2d 85 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983); *Deutsche Lufthansa v. Civil Aeronautics Board*, 479 F.2d 912 (D.C. Cir. 1973); *Warren v. Flying Tiger Line*, 352 F.2d 494 (9th Cir. 1965); *Mertens v. Flying Tiger Line*, 341 F.2d 851 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965); *Manion v. Pan American World Airways*, 55 N.Y.2d 398, 434 N.E.2d 1060, 449 N.Y.S.2d 693 (1982); *Egan v. Kollsman Instrument Corp.*, 21 N.Y.2d 160, 234 N.E.2d 199, 287 N.Y.S.2d 14 (1967), *cert. denied*, 390 U.S. 1039 (1968).

The clear intent of the drafters of Article 3 was to make passengers aware of the limitation so that they could take self-protective measures, such as purchasing insurance,

prior to boarding a flight. *Deutsche Lufthansa v. Civil Aeronautics Board*, 479 F.2d 912, 917 (D.C. Cir. 1973) ("[T]he passenger is to receive full and effective notice of any limitations of liability so that alternative protection may be obtained."); *Block v. Compagnie National Air France*, 386 F.2d 323, 333-34 (1967).

Adequate size of the damage limitation is a key to Article 3. *Lisi v. Alitalia*, 390 U.S. 455 (1968), *aff'g mem. by an equally divided Court*, 370 F.2d 508 (2d Cir. 1966), held that delivery of a small print notice was the equivalent of no notice at all. The Second Circuit found that a carrier's 4-point type notice was "camouflaged in Lilliputian print", being "virtually invisible" and "diminutively sized." 370 F.2d at 514. Thus, the airline was barred from asserting the limitation:

> The Convention's arbitrary limitations on liability—which have been severely and repeatedly criticized—are advantageous to the carrier. But the *quid pro quo* for this one sided advantage is delivery to the passenger of a ticket and baggage check which give him notice that on the air trip he is about to make, the amount of the recovery to him or his family in the event of a crash, is limited very substantially.

Id. at 512-13.[10]

Soon after *Lisi*, a unanimous panel of the New York State Court of Appeals held that a similar small print

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10 The United States government opposed the grant of certiorari in *Lisi* and agreed with the Second Circuit "that a ticket purporting to warn of limited liability under the Warsaw Convention does not of itself comply with Article 3 of the Convention if printed in type too small to attract reasonable notice." Brief for *Amicus* C.A.B. at 1n, *Lisi v. Alitalia*, 390 U.S. 455 (1968).

warning (in 4.5 point type) violated Article 3 of the Convention as a matter of law and voided the limitation. *Egan v. Kollsman Instrument Corp.*, 21 N.Y.2d 160, 234 N.E.2d 199, 287 N.Y.S.2d 14 (1967), *cert. denied*, 390 U.S. 1039 (1968).[11]

Likewise, the Ninth Circuit, Second Circuit and the New York State Court of Appeals have held that the Article 3 notice must be delivered sufficiently in advance of a flight to allow a passenger to take self protective measures. *Warren v. Flying Tiger Line*, 352 F.2d 494 (9th Cir. 1965) (limitation forfeited since ticket warning was not delivered until passenger was on the ramp leading into the aircraft); *Mertens v. Flying Tiger Line*, 341 F.2d 851 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965) (airline denied limitation where passenger received ticket notice after boarding); *Manion v. Pan American World Airways*, 55 N.Y.2d 398, 434 N.E.2d 1060, 449 N.Y.S.2d 693 (1982) (limitation denied since airline failed to deliver ticket until after passenger had completed first leg of her trip).

Korean Air Lines Disaster is contrary to all other United States cases in holding that adequate notice is not a *quid pro quo* of the damage limitation. App. A, *infra*, pp. A-30 to A-39; 664 F. Supp. at 1473-76.

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11 *Lisi v. Alitalia* and *Egan v. Kollsman Instrument Corp.* involved air crashes which occurred several years before the Montreal Agreement and Federal Aviation Regulation § 221.175(a) were enacted. Both courts noted, however, the then recent adoption of the 10 point minimum standard. *Lisi v. Alitalia*, 370 F.2d at 514 n. 10; *Egan v. Kollsman Instrument Corp.*, 21 N.Y.2d at 171, 234 N.E.2d at 204, 287 N.Y.S.2d at 21.

C. The *Polish Airlines* decision of the Second Circuit and the *New Orleans Disaster* decision of the Fifth Circuit are squarely in point and oppose *Korean Air Lines Disaster*

A clear standard for the minimum size of the Article 3 warning—10 point type—was set when the Executive Branch promulgated 14 C.F.R. § 221.175(a) and then required international airlines to enter the "special contract" known as the Montreal Agreement. Korean Air Lines signed the agreement in 1969. Both the regulation and Agreement prescribe that the Warsaw notice be printed "in type at least as large as 10 point modern type".

In *Polish Airlines*, 705 F.2d 85 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983), the airline delivered an Article 3 warning in small 8.5 point type, violating the Agreement and Regulation. Based on an exhaustive review of the history of the Convention and its notice provisions, the Second Circuit held that the carrier had forfeited the limitation. *Id.* at 91. The Fifth Circuit recently reached the same result where the airline delivered a 9 point warning. *New Orleans Disaster*, 789 F.2d 1092, 1102 (5th Cir.), *reh'g granted*, 795 F.2d 381 (5th Cir. 1986), *reinstated*, 821 F.2d 1147, 1171 (5th Cir. 1987) (*en banc*).

In the case at bar, KAL printed its Article 3 notice in 8 point type print, smaller than the notices issued in *Polish Airlines* and *New Orleans Disaster*. Yet *Korean Air Lines Disaster* holds that KAL may benefit from the damage limitation despite its failure to provide the specified warning. This result contravenes the history, purpose and language of the Warsaw/Montreal system.

1. *Korean Air Lines Disaster* upsets the uniform 10 point minimum standard for the Article 3 warning demanded by the United States as a condition for withdrawing its denunciation of the Convention

The 10 point type standard was imposed because of the concern of the United States government that international airlines were avoiding their Warsaw obligation to give passengers a proper notice of the unusual limited liability system. Article 3 of the Convention did not specify the size of the warning required to benefit from the limitation and many airlines printed "notices" in unreadable small type. Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 512-14 (1967) ("Even if the passenger could read the ticket, he would hunt in vain for warning of the liability limit."). If the unorthodox damage limitation was to continue, at least the passenger should receive a proper Article 3 notice. *Ibid.*

In 1955, American negotiators at the Hague Convention unsuccessfully argued for an Article 3 warning measuring one half centimeter high—larger than 10 point type. *Id.* at 514. The Protocol adopted by the Hague Convention was subsequently rejected by the United States because its revised limitation of $16,600 was considered too low and its ticket notice provisions were inadequate. *Id.* at 512-16.

In 1963, the Civil Aeronautics Board enacted a regulation requiring that the Article 3 notice be printed in at least 10 point type. 14 C.F.R. § 221.175(a). The regulation applied to each "air carrier and foreign air carrier which, to any extent, avails itself of the limitation on liability to passengers provided by the Warsaw Convention". *Ibid.*

The C.A.B. defended its 10 point standard by stating that "lesser notice does not suffice to give adequate notice appropriate in the public interest", Brief for *Amicus* C.A.B. at 9, *Lisi v. Alitalia*, 390 U.S. 455 (1968), and that "[t]he fixing of standards of notice by either the courts or the Board is in nowise inconsistent with Warsaw." Brief for Appellee C.A.B. at 36, *Deutsche Lufthansa v. Civil Aeronautics Board*, 479 F.2d 912, 917 (D.C. Cir. 1973).

In November 1965, continuing dissatisfaction led the United States to denounce the Convention, effective six months later. *See Trans World Airlines v. Franklin Mint*, 466 U.S. 243, 252 & n. 22. On the eve of the effective date in May 1966, faced with the prospect of losing the limitation entirely, international airlines drafted the Montreal Agreement. As a "special contract" under Article 22(1) of the Convention, the Agreement "incorporates all other provisions of the Convention." Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 597 (1967).

The Agreement added the terms demanded by the United States: (1) the Warsaw limitation was raised to $75,000; (2) the defense available to the carrier under Article 20(1), that "all necessary measures" were taken to avoid the accident, was waived, and; (3) airlines stipulated that they would issue a ticket with an Article 3 notice printed in at least 10 point type, as set forth in the C.A.B. regulation.

As a result of the airlines' contractual commitment, the United States formally accepted the Agreement and withdrew its denunciation. *Id.* at 596. All foreign airlines must sign the Agreement as a condition of their Foreign Air

Carrier Permit to conduct business in the United States. 14 C.F.R. § 213.7. KAL signed in 1969.

2. The decisions in *Polish Airlines* and *New Orleans Disaster* are compelling

Polish Airlines held that the obligations an airline accepts under the Montreal Agreement must be considered along with Article 3 of the Convention:

> Under the Convention, the carrier must deliver a ticket containing, *inter alia*, a statement referring to the liability rules. Article 3(1)(e). Under the modifying terms of the Montreal Agreement, however, that statement must be in 10 point type. 705 F.2d at 89.

The Montreal Agreement supplemented the Warsaw Convention by adding those terms demanded by the United States in exchange for its continued participation in the Treaty. As the Second Circuit observed, "adequacy of notice was one of the concerns that led to the filing of the Notice of Denunciation . . . and . . . the Montreal Agreement specifically addressed this concern by requiring 'notice to each passenger in large type' ". 705 F.2d at 89-90. The United States relied upon this promise by withdrawing its Notice of Denunciation and continuing as a party to the Treaty. If the world's airlines had not signed the Agreement, "there would in all probability be no Convention today." 705 F.2d at 91.

With the 10 point requirement, the airlines stipulated to a clear and uniform minimum standard for an acceptable Article 3 notice. Delivery of a notice in less than 10 point type is inadequate as a matter of law:

> The 10 point guideline is a clear one, and quite easy to follow. To be sure, any such line drawing has an arbitrary air, but LOT is a party to the line drawn and it seems to us less arbitrary to accept the 10 point standard than it would be to guess on a case-by-case basis at what constitutes "adequate notice". 705 F.2d at 90 n. 10.

See also New Orleans Disaster, 789 F.2d 1092, 1098 ("10 point type means exactly that, 10 point type.").

The Second Circuit also recognized the rulemaking authority granted to the Executive Branch by statute to implement the Warsaw Convention. 49 U.S.C. § 1502. The court found that the promulgation of 14 C.F.R. § 221.175(a) and the negotiation and acceptance of the Montreal Agreement by the United States "indicate a judgment by at least the executive branch that 10 point type was necessary to provide sufficient notice" to the passenger under Article 3. 705 F.2d at 90.

In this regard, *Polish Airlines* is supported by this Court's recent ruling in *Trans World Airlines v. Franklin Mint*, 466 U.S. 243 (1984), which upheld and applied another Civil Aeronautics Board regulation interpreting the cargo limitation of the Warsaw Convention. *Franklin Mint* ruled an Executive Branch determination made pursuant to properly delegated authority is controlling "unless we find it contrary to law established by domestic legislation or by the Convention itself." *Id.* at 254.

The 10 point standard plainly gives substantive effect and meaning to Article 3 of the Convention and its requirement of delivery. Not only has the Executive Branch properly set this minimum standard by regulation, but KAL bound itself to provide such notice by signing the Montreal Agreement.

D. *Korean Air Lines Disaster* is contrary to the *Deutsche Lufthansa* case decided by the same Circuit

The ruling in *Korean Air Lines Disaster* also conflicts with a prior decision of another panel of the District of Columbia Circuit.

In *Deutsche Lufthansa v. Civil Aeronautics Board*, 479 F.2d 912 (D.C. Cir. 1973), the German national airline challenged the 10 point ticket notice requirement imposed by the Civil Aeronautics Board as contrary to the Convention. But the District of Columbia Circuit stated that "the provisions of Article 3 may be supplemented by additional regulations" and ruled that the 10 point standard "not only does not contradict the provisions of the Warsaw Convention *but gives [Article] 3(1)(e) substantive effect*." *Id.* at 916, 918 (emphasis added).

The Circuit expressly adopted the Second Circuit ruling in *Lisi v. Alitalia*. *Id.* at 917. And *Deutsche Lufthansa* stated that compliance with the type size requirement will dictate whether the airline may later raise the limitation:

> Compliance with the [10 point type] regulation will not only provide passengers with adequate notice of the limitations on liability imposed on them but will later enable the carrier to invoke the protection of [Article] 3(1)(e), for *unless adequate notice is accorded its passengers, the carrier will later be precluded from using the Convention to limit liability.* *Id.* at 918 (emphasis added).

E. Denial of certiorari would present a serious problem for the transferor courts

As discussed in Section II, *infra*, eleven actions should be transferred back to New York district courts at the end of pretrial proceedings pursuant to 28 U.S.C. § 1407. *Korean Air Lines Disaster* expresses its belief that the law of the case should govern after the cases are returned. App. A, *infra*, p. A-11; 829 F.2d at 1176. But the New York courts are bound to apply the decisions of the Second Circuit in *Polish Airlines* and *Lisi v. Alitalia*. *Ithaca College v. N.L.R.B.*, 623 F.2d 224 (2d Cir. 1980) (a decision of the court of appeals, not overruled by the Supreme Court, is binding on all inferior courts and litigants within the Circuit).

If this Court declines to decide the Warsaw/Montreal issue, the New York district courts would find themselves "suspended between the doctrine of stare decisis and the doctrine of the law of the case. In such a circumstance the . . . court would invite reversal if it did not follow the decisions of its own courts of appeals." 1B J. Moore, *Moore's Federal Practice* ¶ 0.404[4.-2], p. 129 (2d ed. 1987).

F. *Korean Air Lines Disaster* lacks precedent in support of its Warsaw holding and should be reversed

The sole decision cited favorably by *Korean Air Lines Disaster* was a Canadian Supreme Court ruling: *Ludecke v. Canadian Pacific Airlines*, 98 D.L.R.3d 52 (Can. 1979). App. A, p. A-34; 664 F. Supp. at 1474. But *Ludecke* did not involve a ticket governed by the Montreal Agreement or 14 C.F.R. § 221.175(a). And *Ludecke* is contrary to the uniform decisions of American courts

over the past two decades in *Lisi v. Alitalia*, *Deutsche Lufthansa*, *Polish Airlines* and *New Orleans Disaster*.

Korean Air Lines Disaster overlooked the language and purpose of Article 3 of the Convention that "unless adequate notice is accorded its passenger, the carrier will later be precluded from using the Convention to limit liability." *Deutsche Lufthansa v. Civil Aeronautics Board*, 479 F.2d 912, 918 (D.C. Cir. 1973). The opinion does not address the historical relationship between the Convention and the Agreement and the United States' efforts to set a minimum warning standard. *Polish Airlines*, 705 F.2d at 89-90; Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 *Harv. L. Rev.* 497, 599 (1967). Nor does it recognize the authority of the Executive Branch to impose the 10 point minimum standard, *Trans World Airlines v. Franklin Mint*, 466 U.S. 243 (1984), or that the standard gives "substantive effect" to the Convention's notice requirements. *Deutsche Lufthansa v. Civil Aeronautics Board*, 479 F.2d 912, 918 (D.C. Cir. 1973).

International airlines routinely comply with their obligations and gain the limitation by performing the simple mechanical act of issuing notices in at least 10 point type. Such notice is the only measure of protection afforded to passengers in return for the limitation. *Korean Air Lines Disaster* should be reversed to restore the *quid pro quo* of the Warsaw/Montreal system.

II

THIS COURT MAY DESIRE TO CONSIDER AN ADDITIONAL QUESTION CONCERNING THE SUBSTANTIVE FEDERAL LAW TO BE APPLIED FOLLOWING A TRANSFER FOR PRETRIAL PROCEEDINGS

If this Court grants certiorari to decide the Warsaw/Montreal question, the second issue will become moot. Nevertheless, the issue is the subject of a conflict among the Circuits and the Court may desire to address the issue to provide needed guidance in future cases.

A. *Korean Air Lines Disaster* conflicts with numerous authorities which hold that following a transfer for pretrial proceedings, the transferee court is bound to apply the substantive federal law of the transferor circuit

In *Van Dusen v. Barrack*, 376 U.S. 612 (1964), the Supreme Court held that following a 28 U.S.C. § 1404 transfer of a diversity case, the transferee court was bound to apply the substantive law of the transferor court. *Van Dusen* reasoned that a "change of courtrooms" should not "significantly affect the outcome of the case." *Id.* at 639 & n. 40.

Korean Air Lines Disaster limited the scope of *Van Dusen* to questions of state law. App. A, *infra*, p. A-6 to A-11; 829 F.2d at 1174-76. But the vast majority of courts facing this issue have held otherwise and applied *Van Dusen* to federal law issues. *Berry Petroleum v. Adams & Peck*, 518 F.2d 402, 408 (2d Cir. 1975) (as to a federal securities law issue: "Since this case was brought in a district court in the Fifth Circuit, the substantive law of

that circuit is the law we must consider here."); *In re Haven Industries*, 462 F. Supp. 172, 179 (S.D.N.Y. 1978) (as to a federal securities law issue: "As the transferee court in this multidistrict litigation, this court must apply the law of the transferor forum."); *Stirling v. Chemical Bank*, 382 F. Supp. 1146, 1150 n. 5 (S.D.N.Y. 1974) (as to a federal securities law issue: "This Court must apply the substantive law of the transferor forum."); *In re Four Seasons Securities Laws Litigation*, 370 F. Supp. 219, 228 (W.D. Okla. 1974) (as to a federal bankruptcy law issue: "In cases transferred under 28 U.S.C. § 1407(a) the substantive law of the transferor forum applies after transfer."); *In re Plumbing Fixtures Litigation*, 342 F. Supp. 756, 758 (J.P.M.L. 1972) (as to a federal antitrust law issue: "It is clear that the substantive law of the transferor forum will apply after transfer . . ."); *Philadelphia Housing Authority v. American Radiator*, 309 F. Supp. 1053 (E.D. Pa. 1969) (as to a federal antitrust law issue: "the applicable law to be applied in Section 1407 transfers is the law of the transferor district.").

Korean Air Lines Disaster conflicts with this line of authority and holds that a transfer for pretrial proceedings may result in a change of substantive federal law.[12] App. A, *infra*, p. A-7; 829 F.2d at 1174.

12 At the oral argument of plaintiffs' motion, the district court judge stated that with regard to the cases filed in New York "I know that I am bound by the Second Circuit." Subsequently, in a decision rendered on a separate Warsaw issue involving a case transferred from the Ninth Circuit, the district court held that under *Van Dusen v. Barrack*, 376 U.S. 612 (1964), it was bound to apply the law of the transferor Ninth Circuit. *In re Korean Air Lines Disaster*, 664 F. Supp. 1478, 1480 (D. D.C. 1986). The *Van Dusen* issue was not addressed by the district court in its first opinion on the Warsaw/Montreal ticket issue despite the fact that it was briefed and argued by the parties. Subsequently, the Court of Appeals specifically remanded for further findings related to *Van Dusen*. The district court then reversed itself, and held that the *Van Dusen* rule did not apply to federal law issues. App. A, *infra*, pp. A-67 to A-70; 664 F. Supp. 1488-90.

B. Contrary to the rationale of this Court's ruling in *Van Dusen*, *Korean Air Lines Disaster* rewards the defendant for forum shopping

Korean Air Lines Disaster defeats the rationale of *Van Dusen* by rewarding KAL for forum shopping. A transfer for pretrial proceedings under 28 U.S.C. § 1407 "does not justify the rather startling conclusion that one might 'get a change in law as a bonus for a change of venue'." *Van Dusen*, 376 U.S. at 636.

Eleven plaintiffs on this appeal filed in New York, where six of them resided, where flight 7 departed, where KAL issued nearly all of the defective tickets and where KAL conducts regular flights. But soon after the disaster, KAL realized that it had issued the small print tickets to many passengers. It quickly sought a Section 1407 transfer to the District of Columbia, which had no connection to flight 7, KAL's flight operations, any KAL witnesses or the plaintiffs.[13] KAL's attempt to avoid the application of *Polish Airlines* and *Lisi v. Alitalia* is obvious.

Korean Air Lines Disaster, however, does not address the forum shopping considerations of *Van Dusen*.

13 The Multidistrict Panel granted KAL's motion not on the grounds of any convenience of the District of Columbia to the airline, but because of the Panel's belief that discovery would be conducted of government agencies located in the District. *In re Korean Air Disaster*, 575 F. Supp. 342 (J.P.M.L. 1983).

C. *Korean Air Lines Disaster* undermines the multidistrict transfer system

The purpose of 28 U.S.C. § 1407 is to "promote the just and efficient conduct" of complex actions. A Section 1407 transfer may be made to *any* district regardless of federal venue requirements. The transfer determination under Section 1407 is often based on court case loads and the availability of a particular district judge.

The Multidistrict Panel certainly did not believe that its transfer would result in a change of the applicable law. *In re Plumbing Fixture Cases*, 342 F. Supp. 756, 758 (J.P.M.L. 1968); *see Manual for Complex Litigation, Second* § 31.122, p. 254 n. 25.

But *Korean Air Lines Disaster* granted KAL a substantive law benefit resulting from its transfer for mere discovery convenience. If this ruling is allowed to stand, courts "would at least be reluctant to grant transfers, despite considerations of convenience, if to do so might conceivably prejudice the claim of a plaintiff who had initially selected a permissible forum." *Van Dusen*, 376 U.S. at 636.

Prior to *Korean Air Lines Disaster*, every multidistrict case which addressed whether this Court's holding in *Van Dusen* applied to federal law questions has respected the law of the transferor Circuit. This is undoubtedly because 28 U.S.C. § 1407 contemplates that the case will eventually be returned to the transferor court for trial. But *Korean Air Lines Disaster* threatens the proper working of the multidistrict transfer system by allowing a change in courtrooms to change the ultimate outcome of the case.

CONCLUSION

Certiorari should be granted to address the conflict among the Circuits created by *Korean Air Lines Disaster* on the proper interpretation of the Warsaw Convention and Montreal Agreement.

Respectfully submitted,

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APPENDIX A

Opinion of Court of Appeals for the
District of Columbia Circuit

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5982

IN RE: KOREAN AIR LINES DISASTER OF
SEPTEMBER 1, 1983

PLAINTIFF'S STEERING COMMITTEE, APPELLANT

Appeal from the United States District Court
for the District of Columbia
(Misc. No. 83-00345)

Argued January 20, 1987

Decided September 25, 1987

Milton G. Sincoff, with whom *Donald W. Madole* and *Steven R. Pounian* were on the brief for appellant.

George N. Tompkins, Jr. for appellee.

Before: RUTH B. GINSBURG, WILLIAMS, and D.H. GINSBURG, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* RUTH B. GINSBURG.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Concurring opinion filed by *Circuit Judge* D.H. GINSBURG, in which *Circuit Judge* WILLIAMS joins.

GINSBURG, RUTH B., *Circuit Judge*: This case arises out of an air disaster and raises turbulent federal questions. On September 1, 1983, Korean Air Lines (KAL) Flight 007, a commercial craft departing from Kennedy Airport in New York and bound for Seoul, South Korea, was destroyed over the Sea of Japan by Soviet Union military aircraft. Wrongful death actions were filed against KAL in several federal district courts; the Judicial Panel on Multidistrict Litigation transferred these actions to the District Court for the District of Columbia for pretrial proceedings pursuant to 28 U.S.C. § 1407 ("[C]ivil actions involving one or more common questions of fact . . . pending in different districts . . . may be transferred to any district for coordinated or consolidated pretrial proceedings.").

The nub of the controversy relates to the per passenger damage limitation of the Warsaw Convention,[1] raised to $75,000 by an accord among airlines known as the Montreal Agreement.[2] By motion for partial summary judgment, plaintiffs sought a declaration "that [KAL] is liable without fault for compensatory damages without any limitation of $75,000." Joint Appendix (J.A.) at 26. Plaintiffs grounded this motion on the inadequate type size of the liability limitation notice printed on KAL passenger tickets. The notice appeared in 8 point type; the Montreal Agreement specifies 10 point type. Denying plaintiffs' motion, the district court, on July 25, 1985,

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. § 1502 note (1982).

[2] Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB Agreement 18900, 31 FED. REG. 7302 (1966) (approved by CAB Order E-23680, May 13, 1966).

held that KAL could avail itself of the $75,000 per passenger limitation. *In re Korean Air Lines Disaster of September 1, 1983*, 19 Av. L. Rep. (CCH) 17,584 (D.D.C. 1985). In so ruling, the district court considered and rejected contrary Second Circuit precedent: *In re Air Crash Disaster at Warsaw, Poland, on March 14, 1980*, 705 F.2d 85 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983).

On September 24, 1985, the district court certified for interlocutory appeal under 28 U.S.C. § 1292(b) the question whether KAL "is entitled to avail itself of the limitation of damages provided by the Warsaw Convention and Montreal Agreement despite its defective tickets." We ruled that the requirements of section 1292(b) were met and that "wise exercise of our discretion dictates that the appeal be allowed." D.C. Cir. Order filed April 8, 1986.

On January 30, 1987, after argument of the appeal, we remanded the record for clarification of the scope of the district court's order denying plaintiffs' partial summary judgment motion. Specifically, we observed that the cases consolidated in this appeal

> can be grouped into three categories on the basis of the fora in which they were originally filed and to which they are to be remanded at or before the conclusion of pretrial proceedings, unless the actions are earlier terminated: (a) the Southern and Eastern Districts of New York; (b) the Eastern District of Michigan and the District of Massachusetts; and (c) the District of Columbia. The district judge, in his order denying plaintiffs' motion for partial summary judgment, did not expressly consider the contention that, by analogy to the principle set forth in *Van Dusen v. Barrack*, 376 U.S. 612 (1964), he was bound by Second Circuit precedent in resolving the claims of plaintiffs in the first category enumerated above.

> The extent of a transferee court's authority under 28 U.S.C. § 1407 independently to resolve issues of [federal] law already passed upon by the federal court of appeals for the circuit in which the transferor forum is located is apparently a question of first impression, and our consideration of this issue is hampered by uncertainty as to which plaintiffs were covered by the district court's July 1985 order.

D.C. Cir. Order filed January 30, 1987.

By Memorandum dated May 7, 1987, the district court held that its July 25, 1985 decision denying plaintiffs' partial summary judgment motion applies to all three categories of cases described in this court's January 30, 1987 remand-for-clarification order. We now affirm the district court's dispositions. On the Warsaw Convention/Montreal Agreement $75,000 per passenger damage limitation issue, we adopt as our opinion the comprehensive July 25, 1985 Memorandum of the district court, and we reprint that disposition as an appendix hereto. We set out below our reasons for concluding that the district court properly adhered to its own interpretation of the Warsaw Convention/Montreal Agreement in all actions, including those transferred from district courts within the Second Circuit.

The Supreme Court, in *Van Dusen v. Barrack*, 376 U.S. 612 (1964), addressed and resolved this question: when a defendant in a diversity action moves for a venue transfer under 28 U.S.C. § 1404(a),[3] which state's law applies post-transfer? The state law that would have applied in the transferor court adheres to the case, the Supreme Court held; in the Court's words, "with respect

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[3] Under this change of venue prescription, "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

to state law," the venue change will accomplish "but a change of courtrooms." *Van Dusen*, 376 U.S. at 639.[4]

The *Van Dusen* interpretation of 28 U.S.C. § 1404(a), as the latter applies in diversity actions, rests on principles advanced in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), and cases in the *Erie* line. *Van Dusen*, 376 U.S. at 637-40; *see particularly Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 387 (1941) (on issues of state law arising in diversity cases, federal courts must apply choice-of-law rules of states in which they sit). Justice Goldberg explained for the Court in *Van Dusen*:

> [O]ur interpretation [of § 1404(a)] . . . is supported by the policy underlying *Erie*[.] . . . [W]e should ensure that the "accident" of federal diversity jurisdiction does not enable a party to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed. . . . What *Erie* and the cases following it have sought was an identity or uniformity between federal and state courts; and the fact that in most instances this could be achieved by directing federal courts to apply the laws of the States "in which they sit" should not obscure that, in applying the same reasoning to § 1404(a), the critical identity to be maintained is between the federal district court which decides the

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[4] The *Van Dusen* Court expressly did not decide whether the law of the state in which the transferor court sits would apply if plaintiff rather than defendant sought the transfer, or if a state court in the transferor court's state would dismiss the case on forum non conveniens grounds. *Van Dusen*, 376 U.S. at 640. Wright, Miller & Cooper indicate that several courts have applied the law of the transferor court even when plaintiff rather than defendant, moves for a transfer. 15 C. WRIGHT, A. MILLER & E. COOPER, *Federal Practice and Procedure* § 3846, at 367 (2d ed. 1986). A strong argument, however, favors application of the law of the transferee state in such instances. *See* ALI, *Study of Division of Jurisdiction Between State and Federal Courts*, § 1306(c) & commentary (1969).

case and the courts of the State in which the action was filed.

Van Dusen, 376 U.S. at 637-39 (footnotes omitted).

Defendants in *Van Dusen* sought to transfer the case from the Eastern District of Pennsylvania to the District of Massachusetts. (Massachusetts, but not Pennsylvania, limited the damages plaintiffs could recover.) Were the transfer to be made, the Supreme Court ruled, though all further proceedings would take place in the Massachusetts district court, Pennsylvania law, not Massachusetts law, would furnish the governing state prescriptions.

The question before us is whether the *Van Dusen* rule—that the law applicable in the transferor forum attends the transfer—should apply to transferred federal claims. It is a question meriting attention from Higher Authority. Congress, it appears, has not focused on the issue,[5] nor has the Supreme Court addressed it. The Judicial Panel on Multidistrict Litigation assumed, on at least one occasion, that the *Van Dusen* rule would apply to transferred federal claims, *see In re Plumbing Fix-*

[5] In Senate hearings on the bill that eventually became the multidistrict litigation statute, two witnesses stated that *Van Dusen* would apply to choice-of-law issues under the measure. The experience of those witnesses related to federal claims for antitrust law violations and it may be that they intended their statements to cover such claims. *See Multidistrict Litigation: Hearings on S. 3815 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 13, 25 (1966) (statements of Dean Phil Neal and Judge William Becker). The Supreme Court, however, in explicit and repeated qualifications, confined its *Van Dusen* opinion to questions of state law. *See* 376 U.S. at 625-26, 630, 633, 635, 639. The snippet of legislative history just described, therefore, is at best equivocal; the two witnesses perhaps "mean[t] only that *Van Dusen* would apply to state law issues in cases transferred under the new statute." Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 710-11 (1984).

tures Litigation, 342 F.Supp. 756, 758 (J.P.M.D.L. 1972),[6] but the Panel, from what we can glean, has given the matter only fleeting consideration.[7] Recognizing that the question is perplexing, particularly in the context of 28 U.S.C. § 1407, a statute authorizing transfers only for pretrial purposes, we are persuaded by thoughtful commentary that "the transferee court [should] be free to decide a federal claim in the manner it views as correct without deferring to the interpretation of the transferor circuit." Marcus, *Conflict Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 721 (1984); *see also* Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U. PA. L. REV. 595, 662-706 (1987).

As the district court stressed in response to our remand, the *Erie* policies served by the *Van Dusen* decision do not figure in the calculus when the law to be applied is federal, not state. Given the reality of conflict among the circuits on the proper interpretation of federal law, however, why deny to a plaintiff with a federal claim the "venue privilege" a diversity claimant enjoys? Plaintiffs in the *Van Dusen* situation could effectively pick Pennsylvania rather than Massachusetts law and retain the benefit of that choice after transfer. Why deny a similar right of selection and retention to plair tiffs who would fare better under the Second Circuit

[6] In *Plumbing Fixtures*, a plaintiff resisted § 1407 transfer of his price-fixing claim on the ground that under transferee forum precedent, his standing to sue would be rejected. The Panel stated, with no elaboration: "It is clear [under *Van Dusen*] that the substantive law of the transferor forum will apply after transfer." 342 F.Supp. at 758.

[7] Several lower courts have also declared, without exposition, that *Van Dusen*'s reasoning would apply to transferred federal claim cases. *See* Marcus, *supra* note 5, 93 YALE L.J. at 692-93 & n.100 (citing cases). Other lower courts have stated that *Van Dusen* does not apply to transferred federal claims. *Id.* at 693 n.102 (citing cases).

interpretation of federal law than under the D.C. Circuit's interpretation?

The point has been cogently made that venue provisions are designed with geographical convenience in mind, and not to "guarantee that the plaintiff will be able to select the law that will govern the case." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 n.24 (1981); *see* Marcus, *supra*, 93 YALE L.J. at 696-701. In diversity cases, however, federal courts are governed by *Klaxon* and therefore may not compose federal choice-of-law principles; instead, they must look to state prescriptions in determining which state's law applies. With "no federal choice-of-law principles that favor the application of the law of one state over the law of another," the diversity plaintiff's opening move or "venue privilege" ordinarily fills the gap—it "prevails by default." Marcus, *supra*, 93 YALE L.J. at 700-01. For the adjudication of federal claims, on the other hand, "[t]he federal courts comprise a single system [in which each tribunal endeavors to apply] a single body of law," *H.L. Green Co. v. MacMahon*, 312 F.2d 650, 652 (2d Cir. 1962), *cert. denied*, 372 U.S. 928 (1963); there is no compelling reason to allow plaintiff to capture the most favorable interpretation of that law simply and solely by virtue of his or her right to choose the place to open the fray.

As summarized in the commentary we find persuasive:

> The *Van Dusen* Court stressed the venue privilege because [under *Klaxon*] there is no federal principle by which to select the state law that should govern diversity cases. Where federal claims are transferred, however, the principle that the transferee federal court is competent to decide federal issues correctly indicates that the transferee's interpretation should apply.
>
> . . .
>
> For federal courts, the most significant choice-of-law difference between issues of state law and issues

> of federal law is that they lack competence to [develop rules of decision for] the former and are presumptively competent to decide the latter. . . . [T]he federal courts have not only the power but the duty to decide [issues of federal law] correctly. There is no room in the federal system of review for rote acceptance of the decision of a court outside the chain of direct review. If a federal court simply accepts the interpretation of another circuit without [independently] addressing the merits, it is not doing its job.

Marcus, *supra*, 93 YALE L.J. at 679, 702; *see also* Friendly, *The "Law of the Circuit" and All That*, 46 ST. JOHN'S L. REV. 406, 412 (1972) ("I take [*Van Dusen*] to be limited to choices of *state* law.") (emphasis in original).

Application of *Van Dusen* in the matter before us, we emphasize, would not produce uniformity. There would be one interpretation of federal law for the cases initially filed in districts within the Second Circuit, and an opposing interpretation for cases filed elsewhere. Applying divergent interpretations of the governing federal law to plaintiffs, depending solely upon where they initially filed suit, would surely reduce the efficiencies achievable through consolidated preparatory proceedings. Indeed, because there is ultimately a single proper interpretation of federal law, the attempt to ascertain and apply diverse circuit interpretations simultaneously is inherently self-contradictory. Our system contemplates differences between different states' laws; thus a multidistrict judge asked to apply divergent state positions on a point of law would face a coherent, if sometimes difficult, task. But it is logically inconsistent to require one judge to apply simultaneously different and conflicting interpretations of what is supposed to be a unitary federal law.[8]

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[8] Even if it appears plausible to legal minds to mete out in a consolidated case one version of federal law to plaintiffs

The district judge in the instant case observed that

> [i]f . . . more than one interpretation of federal law exists, the Supreme Court of the United States can finally determine the issue and restore uniformity in the federal system. The uniformity achieved in this [way] is an "informed uniformity" unlike the "blind uniformity" which would result from one court applying the interpretation of another by rote.

May 7, 1987 D.D.C. Memorandum at 4. We agree. The federal courts spread across the country owe respect to each other's efforts and should strive to avoid conflicts, but each has an obligation to engage independently in reasoned analysis. Binding precedent for all is set only by the Supreme Court, and for the district courts within a circuit, only by the court of appeals for that circuit.

We return, finally, to the most anomalous feature of this case. As earlier observed, we deal here not with an "all-purpose" transfer under 28 U.S.C. § 1404(a), but with a transfer under 28 U.S.C. § 1407 "for coordinated or consolidated pretrial proceedings." We have held, in accord with the district court, that the law of a transferor forum—here, the law of the Second Circuit—merits close consideration, but does not have stare decisis effect in a transferee forum situated in another circuit. Should the several cases consolidated for pretrial preparation in the instant proceeding eventually return to transferor courts outside this circuit,[9] would our district court's

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whose counsel filed in the Southern or Eastern District of New York, another to plaintiffs whose counsel filed in the District Court for the District of Columbia, it would be difficult to explain the rationality of such divergencies to the lay persons served by the federal judicial system.

[9] In practice, it has been reported, most cases transferred under § 1407 are not remanded. *See* 1986 Ann. Rep. Director Admin. Off. U.S. Courts 128 (as of June 30, 1986, 15,026 actions had been subject to § 1407 proceedings; of those, 10,903 had been terminated by the transferee court); Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U. PA. L. REV. 595, 667 & n.247, 700 & nn.410, 411 (1987); Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts, and Transferee Courts*, 78 F.R.D. 575, 583 (1978).

Warsaw Convention/Montreal Agreement ruling, which we have affirmed, have binding force? We believe it should, as "law of the case," for if it did not, transfers under 28 U.S.C. § 1407 could be counterproductive, *i.e.*, capable of generating rather than reducing the duplication and protraction Congress sought to check. *See* Steinman, *supra*, 135 U. PA. L. REV. at 664-67, 700-704. On this issue in the case at hand, however, our circuit is not positioned to speak the last word.

We affirm the order of the district court that KAL is entitled to avail itself of the limitation on damages provided by the Warsaw Convention and raised to $75,000 by the Montreal Agreement; and we note again that the proper interpretation of the Convention and Agreement, as well as the scope of the transferee court's interpretive authority in a case such as this one, are matters in need of definitive resolution for our national court system.

Affirmed.

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL No. 565
Misc. Docket No. 83-0345

IN RE: KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1983

Civil Action Nos. 83-2793, 83-2941, 83-3154, 83-3177, 83-3204, 83-3441, 83-3445, 83-3448, 83-3449, 83-3450, 83-3451, 83-3452, 83-3453, 83-3454, 83-3455, 83-3456, 83-3457, 83-3458, 83-3459, 83-3460, 83-3461, 83-3462, 83-3463, 83-3464, 83-3465, 83-3466, 83-3467, 83-3468, 83-3469, 83-3470, 83-3473, 83-3474, 83-3587, 83-3588, 83-3792, 83-3793, 83-3889, 83-3891, 83-3898, 83-3901, 83-3902, 83-3903; 84-0029, 84-0030, 84-0402

MEMORANDUM AND ORDER

INTRODUCTION

Before the Court is a motion for summary judgment on the sole issue of the enforceability of the limitation on damages established by the Warsaw Convention (Convention)[1] and asserted by Defendant Korean Air Lines Co., Ltd. (Korean Air Lines) in the above-captioned multidistrict litigation. These Plaintiffs argue that, as a matter of law, Korean Air Lines is liable to them to the full extent of their damages for having delivered defective tickets to their decedents, passengers killed when a commercial airliner (KAL 007) owned and operated by Defendant was tragically destroyed by Soviet military aircraft over the Sea of Japan.

The material facts are undisputed. Defendant delivered tickets to Plaintiffs' decedents before their "international transportation" began. The tickets contained notice of the applicability of the Warsaw Convention's rules limiting Korean Air Lines' liability. The notice was printed in 8.0 type size. Since the passenger tickets at issue included a point of origin, destination or stopping place within the United States, the provisions of the Montreal Intercarrier Agreement (Montreal Agreement),[2] are also relevant. The question before the Court is whether the failure to print notice to passengers of the applicability of the Warsaw Convention in 10-point modern type size, as required by the Montreal Agreement, strips the carrier of the Convention's liability limitation. Having considered the treaty, its history and development, and all evidence presented, the Court concludes that the carrier cannot be prevented from availing itself of the limitation; Plaintiffs' motion shall be denied.

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. § 1502 note (1982).

[2] Agreement Relating to Liability Limiations of the Warsaw Convention and the Hague Protocol, CAB Agreement 18900, 31 FED. REG. 7302 (1966) (approved by CAB Order E-23680, May 13, 1966).

HISTORY OF THE WARSAW CONVENTION

Before considering this motion, it is necessary to clearly understand the Warsaw Convention. It is a multilateral treaty intended to uniformly regulate international airline transportation. Today, more than 120 nations adhere to the rules contained in the Convention. Originally negotiated at two international conferences, the first in Paris in 1925 and the second in Warsaw in 1929, the Convention had a dual purpose. In recognition of the fact that the newly emerging air industry woul link many nations of divergent systems and laws, the first goal was to establish some degree of uniformity as to documentation for tickets and the like and as to the procedure and substantive rules of law which would govern claims arising out of international transportation by air. Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 498-99 (1967). In order to help the then fledgling air industry to attract needed capital, the second goal was to limit the potential liability of the air carriers in the case of accidents. Clearly recognized as the more important goal of the Convention, in Article 22(1), the limitation on liability was set at 125,000 Poincare francs, or approximately 8,300 United States dollars.[3] In exchange for the limitation, the Warsaw Convention, in Article 20, created a rebuttable presumption of air carrier liability unl "he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures." Article 25 then provided that, in cases where a plaintiff is able to

[3] The actual amount was $8,291.87. Block v. Compaignie Nationale Air France, 386 F.2d 323, 325 (5th Cir. 1967). Article 22(4) of the Convention provides that "The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures."

prove "willful misconduct" the carrier will not be entitled to avail himself of the limitation on liability.

On July 31, 1934, the United States deposited its instrument of adherence to the Warsaw Convention in the archives of the Ministry of Foreign Affairs of Poland in accordance with the procedure set forth in Article 37 of the treaty. At the time the Senate ratified the treaty, notably during the time this country (and the world) was in the midst of the Great Depression, the $8,300 amount of the limitation was thought to provide some benefit to both passengers and carriers. Indeed, Secretary of State Cordell Hull transmitted the Warsaw Convention to the Senate with the following statements:

> It is believed that the principle of limitation will not only be beneficial to passengers and shippers as affording a more definite basis of recovery and as tending to lessen litigation, but that it will prove to be an aid in the development of international air transportation, as such limitation will afford the carrier a more definite and equitable basis on which to obtain insurance rates, with the probable result that there would eventually be a reduction of operating expenses for the carrier and advantages to travelers and shippers in the way of reduced transportation charges.

Senate Comm. on Foreign Relations, *Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules*, Sen. Exec. Doc. No. G, 73d Cong., 2d Sess. 3-4 (1934). Therefore, at the time of ratification, the principle and the amount of limitation were assented to by the United States. Since that time and especially with the growth of the air industry to its present proportions, the limitation has become an increasingly uncomfortable and unpopular proposition.

While the limitation was once accepted, it has constantly been the focus of debate and disagreement. The

United States, although adhering to the uniform rules relating to international transportation, has not been satisfied with the low limits placed on air carrier liability. As early as 1935, one year following United States adherence, there was discussion of possible amendment to the Convention. Lowenfeld & Mendelsohn at 502. As a result of the alarm expressed by the United States and other nations where full recovery for personal injury and wrongful death had become the rule, discussions and proposals for change continued until another conference met in September 1955. Convened this time at the Hague, the stated goal was to resolve the debate concerning whether the liability limits had been set at an appropriate level. Lowenfeld & Mendelsohn at 504. The Hague Conference, therefore, had a limited purpose with the intent being to retain uniformity in the rules and conditions expressed in the Warsaw Convention while resolving the dissatisfaction with the low limits of liability. S. SPEISER & C. KRAUSE, 1 *Aviation Tort Law* 670-74 (1978).

Through much negotiation and debate the Hague Protocol did, among other things, double the limitation to $16,600. Nonetheless, the outcome of the Hague conference failed to resolve the dissatisfaction; the United States never ratified the Hague Protocol. In fact, the amendments to Warsaw were never presented to the Senate for ratification, since even the increased limitation faced an unpleasant political climate. Lowenfeld & Mendelsohn at 515. The limitation amount therefore remained at $8,300 in this country.

Discontent continued for another decade. Then, in 1965, the United States determined that the Warsaw limitation could no longer be tolerated and decided to denounce the treaty. Deposited November 15, 1965 and in accordance with Article 39, set to become effective six months later, the State Department Press Release concerning the Notice of Denunciation stated that "the United States wishes to make clear that the action to denounce the Warsaw Convention is taken *solely* because of the Convention's low limits of liability for injury or death to passengers, and in no way represents a departure from the longstanding commitment of the United States to the tradition of international cooperation in matters relating to civil aviation." 53 Dept. State Bull. 923, 924 (1965) (emphasis added). The Notice continued to state clearly that the threat of denunciation would be withdrawn if the limitation were raised, by special contract or otherwise, to preferably $100,000 but not less than $75,000.

The Montreal Agreement was adopted in response to the United States' decision to withdraw from the Warsaw Convention. Unlike the Hague Protocol, the Montreal Agreement did manage to calm the din of criticism of the low limits which had, by 1965, "reached a crescendo." S. SPEISER & C. KRAUSE at 674. In order to avert United States denunciation of the treaty, air carriers agreed to raise the limitation amount to $75,000 and to submit to virtual strict liability; the Montreal Agreement provides that an air carrier "shall not . . . avail itself of any defense under Article 20(1) of said Convention or said Convention as amended by [Hague] Protocol." In addition, the Agreement provided that the "Montreal Advice" would be printed in 10-point type and in ink contrasting with the ticket stock. However, the Montreal Agreement is completely silent with respect to sanctions to be imposed for failure to comply with any of its three provisions.

Contrary to the view that waiver of the limitation was contemplated, the Montreal Agreement was entered into to *preserve* the limitation. Intended only as an interim agreement until the treaty could be amended, the Montreal Agreement achieved a stand-off on the issue of the level of the limitation. By its very terms, the Agreement is only a "special contract" under the Warsaw Convention. It applies to "international transportation" as defined in Article 1(2) which includes a point in the United States as a point of origin, point of destination, or agreed stopping place. While leaving air carriers liable without

fault, the Agreement permits air carriers to avail themselves of the liability limitation found in Article 22(1); however, the amount of the limitation is increased to $75,000 and the defenses found in Article 20(1) have been waived.

Although the increase from $8,300 to $75,000 was significant, the fact remains that the United States will probably never be satisfied with any amount as a limit upon recovery. Therefore, while the debate has been phrased in terms of the "appropriate" level of the limitation, *see, e.g.*, Lowenfeld & Mendelsohn at 504, it is the very idea of any limit at all which has been and remains the problem. The United States has consistently rejected all limitation amounts; it certainly appears that "no convention with a limitation of damages can possibly pass the Senate of the United States." Kreindler, *A Plaintiff's View of Montreal*, 33 J. AIR L. & COM. 528, 529 (1967).

ISSUES PRESENTED

At issue is the interpretation of Article 3 of the Warsaw Convention which provides:

> (1) For the transportation of passengers the carriers must deliver a passenger ticket which shall contain the following particulars:
>
> (a) The place and date of issue;
>
> (b) The place of departure and of destination;
>
> (c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity; and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;
>
> (d) The name and address of the carrier or carriers;

> (e) A statement that the transportation is subject to the rules relating to liability established by this convention.
>
> (2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. ***Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.***

Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. § 1502 note (1982) (emphasis added).

Originally, Plaintiffs based their motion on a claim that the Montreal Agreement modified these provisions of the Convention so as to require air carriers to deliver to passengers embarking on "international transportation" tickets containing notice of the applicability of the Warsaw Convention in at least 10-point type size in order to limit their liability. It is Plaintiffs' position that the Montreal Agreement also "modified" the treaty provisions relating to the amount of the limitation, raising it from $8,300 to $75,000. Further, Plaintiffs argue that a carrier's failure to print the Montreal Advice in at least 10-point type constitutes "non-delivery" of a ticket under Article 3(2) and therefore triggers the treaty sanction—forfeiture of the limitation for air carrier liability.

In a subsequent pleading, Plaintiffs changed the focus of their argument from a claim that the Convention was modified in Montreal to a claim that the Warsaw Convention is not applicable at all because "Korean Air Lines, a corporate citizen of a nation not a party to the Warsaw Convention, has no standing to avail itself of

the defenses contained in the Warsaw Convention." Plaintiffs' Reply Brief at 3. This argument is based on the notion that there is no treaty relationship between the Republic of Korea and the United States and that, therefore, the Convention cannot apply to an air carrier incorporated in Korea. Plaintiffs contend that the absence of a treaty relationship with Korea, if indeed there is no such relationship, prevents Korean Air Lines from asserting the Warsaw Convention limitation on liability. However, if Plaintiffs are correct and the applicability of the Convention rests on the existence of reciprocal ratification by Korea and there has been no such ratification, then, not only would Korean Air Lines be precluded from claiming the limitation, the Court would be altogether precluded from exercising jurisdiction over the air carrier.

Korean Air Lines vigorously opposes the motion for partial summary judgment. Under either of the somewhat contradictory theories posited by Plaintiffs, Defendant claims that the Montreal Agreement, being an agreement between air carriers, not nations, cannot modify the Warsaw Convention to require or trigger the imposition of the treaty sanction of unlimited liability. Further, Korean Air Lines argues that the United States and the Republic of Korea do maintain a treaty relationship with respect to the Convention; consequentl Plaintiffs' second theory cannot be correct.

By challenging Korean Air Lines' statement that "the rights of the moving plaintiffs and defendant KAL are governed exclusively by the provisions of a treaty of the United States known as the Warsaw Convention," Plaintiffs' second theory impugns the jurisdiction of the Court. The challenge to "treaty jurisdiction" affects not only the actions filed by these Plaintiffs, but this entire multidistrict litigation. Therefore, the question concerning jurisdiction and the requirement of a treaty relationship with Korea must be examined before proceeding to the issue of the applicability of the Warsaw Convention limitation on liability.

JURISDICTION UNDER THE WARSAW CONVENTION

Article 1(1) provides that "[t]his Convention shall apply to all international transportation of persons, baggage or goods performed by aircraft for hire." Article 17 of the Convention makes the carrier liable for the death or personal injury of passengers sustained while engaged in international transportation. Article 24 of the Convention further states that cases brought for damages sustained in the event of wounding of passengers "can only be brought subject to the conditions and limits set out in this convention"; Article 32 emphasizes this point by stating that the parties are prevented from "deciding the law to be applied" or "altering the rules as to jurisdiction." Therefore, nations which are parties to the Warsaw Convention have agreed that actions for wrongful death or personal injury occurring during "international transportation" will be governed by the rules of the Convention.

As a treaty of the United States and, therefore, the "supreme Law of the Land," U.S. Const. art. VI, the Warsaw Convention preempts other laws. Since the Warsaw Convention applies to "international transportation" and since the United States has agreed to this treaty, as "supreme Law of the Land" the Convention exclusively and specifically controls the recovery which plaintiffs seeking damages for wrongful death or personal injury occurring during "international transportation" may receive in American courts. *In re Air Crash Disaster at Warsaw, Poland on March 14, 1980*, 535 F. Supp. 833, 844-45 (E.D.N.Y. 1982), *aff'd*, 705 F.2d 85 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983). The Convention also governs the question of jurisdiction; therefore, the Court must look to the terms of the Convention to determine its applicability.

By its terms, the Warsaw Convention applies only to "international transportation," defined in Article 1(2) as

> any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to tl sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention.

The four conditions specified in Article 28(1), *i.e.*, domicile of the carrier, principal place of business, place where the ticket was purchased or the place of destination, are generally thought to control jurisdiction once "international transportation" has been established. *See, e.g., Vergara v. Aeroflot "Soviet Airlines"*, 390 F. Supp. 1266; 1269 (D. Neb. 1975); *Smith v. Canadian Pacific Airways, Ltd.* 452 F.2d 798 (2d Cir. 1971); *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979). There being no genuine issue respecting either Article 1(2) or Article 28(1) for the tickets relevant to this motion there sho be no question that the Warsaw Convention applies to these actions and that there is treaty jurisdiction in this Court. However, Plaintiffs raise the question of jurisdiction by contending that there is no treaty relationship between Korea and the United States as regards the Warsaw Convention and that the absence of a treaty relationship prevents the Court from exercising any of the Convention's provisions in favor of Defendant, Korean Air Lines, a corporate citizen of Korea. Instead, Plaintiffs would have the Court "enforce" the Montreal Agreement, as though it were a separate contract, without regard to the Warsaw Convention.

Plaintiffs' argument assumes "treaty jurisdiction" is not necessary to maintain these actions. That is incorrect. "If treaty jurisdiction under the Convention does not lie, federal jurisdiction under 28 U.S.C. § 1331(a), which permits cases *arising under* United States treaties, clearly cannot be established." *Smith v. Canadian Pacific Airways, Ltd.*, 452 F.2d at 802 (emphasis in original); *accord, In re Air Crash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301 (9th Cir. 1982). If Plaintiffs are correct, and there is no treaty jurisdiction because there is no treaty relationship, then there is no federal jurisdiction over the Defendant at all.

The Court rejects Plaintiffs' contention that there is no treaty relationship between the United States and Korea. Central to Plaintiffs' argument is the fact that the Republic of Korea adheres to the Protocol Amending the 1929 Convention for the Unification of Certain Rules Relating to International Carriage by Air (Hague Protocol), 478 U.N.T.S. 371 (1955) rather than to the Warsaw Convention. By distinguishing the Protocol from the Convention as though the two are independent treaties and by arguing that there is no treaty relationship between this nation and Korea, Plaintiffs ignore the development of the Warsaw system. Having considered the history of the Hague Protocol, the Court concludes that the Protocol cannot be considered separately from the Warsaw Convention; it consists of nothing more than a list of amendments to the original treaty. Indeed, the only difference between the titles of the Convention and the Protocol are the very words "Protocol to Amend." The very name of the Hague Protocol gives evidence that it was intended and, in fact, is merely the Warsaw Convention with certain alterations.

Knowing the history of the conference which produced the Hague Protocol and the reasons the United States negotiated and signed but never ratified the Hague Pro-

tocol provides a context for understanding the relationship of the United States to those countries which choose to adopt those amendments. First, since the Protocol came later than the Convention it essentially offered new nations a choice: adopt the Warsaw Convention as originally formulated in 1929 or adopt the amended version as formulated in 1955. The purpose of the Warsaw Convention was to unify the rules; the purpose of the Hague Protocol was merely to amend those same rules. Korea has chosen to adhere to the Hague Protocol and is therefore a High Contracting Party to the Warsaw Convention *through* those amendments. In fact, Article XXIII of the Hague Protocol states:

> Adherence to this Protocol by any State which is not a Party to the Convention shall have the effect of adherence to the Convention as amended by the Protocol.

Therefore, since July 13, 1967, Korea has adhered to the Warsaw Convention through its ratification of the Hague Protocol. At least with respect to the unamended portions of the Convention, the United States and Korea are parties to the same treaty.

Moreover, it would hardly encourage the goal of the Warsaw Convention to establish uniform rules, law and procedure for claims arising out of international aviation and then to complicate the application of those rules by requiring reciprocity in ratification. The delegates to the Hague Conference were well aware of this and deliberately adopted the negotiated amendments merely as a Protocol to amend Warsaw rather than as an entirely new convention specifically to retain uniformity. S. SPEISER & C. KRAUSE at 671-72. Plaintiffs' argument fails because "[t]he Convention is not concerned with reciprocal treatment of nationals; its purpose is to unify rules relating to international transportation by air." S. SPEISER & C. KRAUSE at 666.

The negotiations and events which led to the Montreal Agreement were themselves tied to the convention. Plaintiffs' argument that the Montreal Agreement may be considered without resort to the entire Warsaw system of recovery is untenable.

INTERPRETING THE WARSAW/MONTREAL LIMITATION OF LIABILITY

On the issue of maximum liability limits, there has been considerable debate and clash of ideology. Yet more than five decades of discussion have managed to produce no more than an uneasy truce on the issue. The level of the limitation has been tinkered with in hopes of making it more palatable. The United States has been able to force some concessions, principally in the nature of a "special contract"—the Montreal Intercarrier Agreement—increasing the limit for wounding, injury or death occurring during the international transportation of passengers involving a point of origin, point of destination or agreed stopping place in the United States; however, the United States remains unhappy with the concept of a limitation on damages.

While the increase from $8,300 to $75,000 brought about by the Montreal Agreement is certainly significant, evidence of continuing American dissatisfaction with *any* limit is found in the fact that the United States Senate has ratified no Convention, Protocol or Agreement since joining the original Convention. This is true even though the United States has been presented with at least three opportunities to join in treaty amendments to raise the limitation. First, there was the Hague Protocol, and then the proposed Guatemala Protocol.[4] The Guatemala Protocol is drafted so as not to become effective without United States ratification. Although these amendments

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[4] Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, ICAO Doc. No. 8932 (1971), *reprinted in* A. Lowenfeld, Aviation Law Documents Supplement 975-84 (2d ed. 1981).

would have raised the limitation to $100,000, the United States Senate failed to ratify by the required two-thirds margin. The most recent amendments proposed to the Convention were drafted in Montreal. These amendments, known collectively as the Montreal Protocols,[5] would have provided for a maximum recovery of approximately $105,000; still the Senate failed to ratify. *See* 129 CONG. REC. S2237 (daily ed. March 7, 1983); 129 CONG. REC. S2279 (daily ed. March 8, 1983). Having rejected all proposals to date, it certainly seems that t' United States is determined to accept no convention which imposes a limitation on the recovery available to citizens of this country. Therefore, while the debate has been couched in terms of the appropriate level of the limitation, it is the presence of a limitation at all that has been the real concern.

A. *Criticisms of the Treaty Limitation*

There have been two principal criticisms of the Convention's limitations. First, the limitations have been objected to on the ground that the reason for limiting liability in 1929 no longer exists today. In 1929, the limitation was adopted in order to promote a fledgling industry. "The international air giants of today were literally in their swaddling clothes." L. KREINDLER, 1 *Aviation Accident Law* 342 (1963) [hereinafter 1 *Aviation Accident Law*]. Then, the air industry was struggling to become truly international. Capital had yet to be invested and needed encouragement. It was hoped that the limitation on damages would attract capital and allow carriers to obtain insurance that might otherwise be discouraged by the threat of a single catastrophic accident. Lowenfeld & Mendelsohn at 499.

[5] Additional Protocol Nos. 1-4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, ICAO Nos. 9145-9148 (1975), *reprinted in* A. Lowenfeld, Aviation Law Documents Supplement 985-1001 (2d ed. 1981).

Today, however, the world of aviation is vastly different. In the fifty years since the Convention, air carriers have obtained both the necessary capital and insurance to allow the industry to grow to tremendous proportions. It is now the air industry, not individual members of society, which is best able to bear the burden of loss in cases of catastrophic accidents. Society, having accepted the burden of low recoveries during the industry's infancy, now feels that the risk of loss is better placed on what have grown to be major, mature corporations, often operating as world enterprises, instead of the individual victims. The consensus seems to be that "there is no longer any need to provide special protection to an industry which is capable of reimbursing customers for the damages it causes them." Comment, *The Growth of American Judicial Hostility to the Liability Limitations of the Warsaw Convention*, 48 J. AIR L. & COM. 805, 830 (1983). Moreover, it has been noted that domestic airlines managed to flourish without a similar limitation placed on liability. 1 *Aviation Accident Law* at 346.

The second, related, criticism of the treaty limitation has been that liability limitations are "an affront to the American ideal of full and adequate compensation to injured plaintiffs by those responsible for the harm." *Id.* American courts operate under the principle that "[i]t is absolutely basic and fundamental . . . that an injured person should be appropriately compensated for the loss he has sustained." KREINDLER, *supra*, 33 J. AIR L. & COM. at 530. Within our system of law, the imposition of a maximum recovery, without regard to the amount of damages which may be proven, is a significant deviation from traditional American tort law principles. *See* 1 *Aviation Accident Law* at 344-45.

The two major criticisms together, that a limitation on tort recovery is anathema to traditional American legal principles and that the air industry has long since

outgrown the need for special protection, combine for a forceful argument against continued application of the liability limits found in the Convention. "It is not insignificant to note however, that the original policy has lost a great deal of its persuasive force; air travel is no longer an infant industry." S. SPEISER & C. KRAUSE at 636-37. Nevertheless, the fact remains that the United States is a High Contracting Party to the Warsaw Convention, complete with treaty limitation. While this may be at variance with traditional tort law, as long as the political branches of our government choose to adh to the Convention, the courts of the nation are obliged to enforce it as it was negotiated and written. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 273; (1984) (Stevens, J., dissenting).

B. *Interpretations of the Treaty Limitation*

It is well established that treaty interpretation involves a consideration of the history and intent of the contracting sovereigns. *Choctaw Nation v. United States*, 318 U.S. 423 (1943). Treaties are to be construed liberally but are not deemed to be abrogated or modified unless such intent has been clearly expressed. "Legislative silence is not sufficient to abrogate a treaty." *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. at 252. Further, the Warsaw Convention being a treaty of v untary adhesion, should the political branches of our government determine that the treaty obligations have become more onerous than the foreign policy considerations justify, the treaty's provision for denunciation could be invoked again. For this reason, "[p]lainly, a party to a treaty of voluntary adhesion can have no need for the doctrine of *rebus sic stantibus* [changed circumstances], except insofar as it might wish to avoid the notice requirement [Article 39]." *Id.* at 253 n.24. If the adhering nations have no use of the doctrine, then clearly private parties such as these may not invoke the doctrine on their behalf. *Id.* at 253.

And yet American courts, faced with the prospect of enforcing a limitation which has become outmoded and contrary to domestic law, have taken avoidance of the treaty limitation upon themselves and have arrived at an interpretation of the Warsaw system which, in cases such as those presented by Plaintiffs here, eliminates the treaty limitation altogether. There are two provisions in the Warsaw Convention which, as a sanction, strip the limitation of liability from an air carrier. First, there is the "wilful misconduct" section, Article 25, which excepts from the limitation those cases in which a plaintiff can prove that the accident generating the action was caused by the carrier's "wilful misconduct," which is to be defined by the court of law to which the case is submitted. Since the plaintiff's burden under this provision is a heavy one, this Article provides little ground from which to attack the limitation.

Consequently, the majority of courts have addressed the issue through judicial interpretation of Article 3.[6] This provision has provided much space for judicial maneuverings and innovative interpretations. Specifically, Article 3(2) provides:

> The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall nonetheless be subject to the rules of this convention. Nevertheless, *if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.*

(Emphasis added.)

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[6] The limitation has been attacked on constitutional grounds as well, *see, e.g.*, In re Aircrash in Bali, Indonesia on April 11, 1974, 684 F.2d 1301 (9th Cir. 1982); Burdell v. Canadian Pacific Airways, 10 Av. Cas. (CCH) 18,151 (Ill. Cir. Ct. 1968).

By providing for unlimited liability where there has been "nondelivery" of a passenger ticket, this Article of the Warsaw Convention has been given a construction, in conjunction with the Montreal Agreement, which eliminates the limitation for many plaintiffs.

1. "Adequate notice"

Construing the phrase "accept a passenger without a passenger ticket having been delivered" to include physically delivered tickets which fail to contain "adequate notice" of the Warsaw/Montreal limitation, courts have made a way for full recovery where there was none. a line of cases beginning with *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965), through the most recently decided *In re Air Crash Disaster at Warsaw, Poland on March 14, 1980*, *supra*, increasing importance has been placed on the passenger's need to know that in the case of tragedy during international air travel his recovery will be severely limited. "Adequate notice," ordinarily thought of as a domestic legal concept, has been judicially written into the Convention, in order to give "substance" to the provision regarding passenger tickets.

Ironically, a dissenting view in *Lisi* may have been a premonition of the developments to come. Noting that "[t]he majority do not approve of the terms of the treaty and, therefore, by judicial fiat they rewrite it," *Li* ". *Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508, 515 (2d Cir. 1966) (Moore, J., dissenting), *aff'd by equally divided court*, 390 U.S. 455 (1968), the dissent termed the court's action in what was a turning point in the law "judicial treatymaking." *Id.* Further, Judge Moore noted that "[w]ere actual notice to be the requirement, every airline would have to have its agents explain to every passenger the legal effect of the treaty and, in all probability, insist that each passenger be represented by counsel who would certify that he had explained the import of the Convention to his client who, in turn, both

understood and agreed to the limitation." *Id.* While it may be overstated, the hypothetical does drive home the point that preoccupation with the type size has less to do with "adequate notice" than with rejection of the limitation.

Although Article 3(1)(e) specifies that a passenger ticket shall contain "[a] statement that the transportation is subject to the rules relating to liability established by this convention," Article 3(2) says nothing regarding the "adequacy" of notice or any other particulars of the required statement. A literal reading of the provision would seem to indicate that the Convention is intended to apply regardless of whether or not the physical ticket is retained once it has been delivered into the possession of the passenger; certainly, there is no requirement that it be read by the passenger. Also, defects in the physical ticket are not to interfere with the enforceability of the liability rules. Indeed, inadequate notice through the statement could be considered an "irregularity" or defect in the pasenger ticket which "shall not affect the existence or the validity of the contract of transportation, which shall nonetheless be subject to the rules of this convention."

Nevertheless, in *Mertens v. Flying Tiger Line, Inc.*, the Second Circuit found that physical delivery of a ticket once the passenger has boarded the airplane is inadequate and constitutes "nondelivery" under Article 3(2). The court stated: "We read Article 3(2) to require that the ticket be delivered to the passenger in such a manner as to afford him a reasonable opportunity to take measures to protect himself against the limitation of liability. . . . The delivery requirement of Article 3(2) would make little sense if it could be satisfied by delivering the ticket to the passenger when the aircraft was several thousand feet in the air." 341 F.2d at 856-57. However, the situation presented to the *Mertens* court involved *physical* delivery of the passenger ticket. While it is not surprising that an American court would find it necessary that

notice, once required, be given "in such a manner as to afford [the passenger] a reasonable opportunity to take self-protective measures," a notice requirement is nowhere within the treaty nor is the Article 3(1)(e) statement linked with the limitation.

The definition of "adequate notice" found in *Mertens* was dependent upon the timing of the physical delivery of the ticket. The court found that the ticket containing notice must be delivered in circumstances allowing the passenger to obtain additional protection, if desired. Given that the *Mertens* court had decided that the limitation was such an alarming prospect for any passenger to face, it is not surprising that the standard for permitting the limitation to stand and for protecting the passenger against the limitation became strict notice of the limitation.

In *Warren v. Flying Tiger Line, Inc.*, 352 F.2d 494 (9th Cir. 1965), the court followed the reasoning in *Mertens* and held that the very inclusion of a requirement to provide a statement of the applicability of the Convention's limitation meant that "[t]he purpose of such a statement is to notify passengers of the applicability of the Convention, thus affording them an opportunity to take steps to protect against the limitation of liability." 352 F.2d at 497. The Ninth Circuit expanded the *Mertens* holding, stating that there is an "implied requirement of Article 3(2), that delivery of the passenger ticket be made sufficiently in advance of the flight so that the passenger may, if he desires, obtain additional insurance protection." 352 F.2d at 498.

Occurring before the Montreal Agreement became effective, and indeed, before the United States threatened denunciation of the Warsaw Convention, these cases did not rely on the nature or size of the print found on the passenger ticket. Nonetheless, the courts managed to sidestep the limitation and provide what is already proper under domestic law: full recovery to injured plaintiffs.

Then, almost immediately following these cases, again before the Montreal Agreement, focus began to be placed on the "adequacy of notice" as related to the print of the ticket. A landmark case, *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 253 F. Supp. 237 (S.D.N.Y.), *aff'd*, 370 F.2d 508 (2d Cir. 1966), *aff'd by equally divided court*, 390 U.S. 455 (1968), held that "compliance with the Convention requires not mere physical delivery of a ticket and check before departure but delivery of a ticket and check which notify the passenger that the provisions of the Convention which exclude or limit liability are applicable." 253 F. Supp. at 239 (footnote omitted). Having phrased the question with respect to Article 3(2) as one of "adequate notice," the lower court in *Lisi* went on to find that the notice of the applicability of the liability limitations was in fact inadequate because it was printed in "microscopic type," "camouflaged in Lilliputian print in a thicket of 'Conditions of Contract.'" 253 F. Supp. at 243. Further, the court found that the required statement was "ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting color, or anything else. The simple truth is that they are so artfully camouflaged that their presence is concealed." *Id.* In effect, then, the court found that even with advance physical delivery, without a properly legible statement of the limitation, there could be no delivery of the ticket. In this way, the court rewrote that provision in the Convention which states that failure to include the statement of limitation on liability *does* not affect the applicability of the Convention's rules. While the *Lisi* court may well have construed the diminutive statement as equivalent to no statement at all, it seems at least somewhat extreme to have equated this fact to non-delivery of the entire contract of carriage. Article 3(2) appears directed to the *entire* ticket, which is evidence that a contract has been formed, and appears much less concerned with notice of limitation on liability than American courts have imputed to the drafters of the treaty.

On appeal, the Second Circuit noted:

> The Convention's arbitrary limitations on liability—which have been severely and repeatedly criticized—are advantageous to the carrier. But the *quid pro quo* for this one-sided advantage is delivery to the passenger of a ticket and baggage check which give him notice that on the air trip he is about to take, the amount of recovery to him or his family in the event of a crash, is limited very substantially. Thus the passenger is given the opportunity to purchase additional flight insurance or to take such other steps for his self-protection as he sees fit.

370 F.2d at 512-13 (footnote omitted). Again, the court was concerned with giving the Convention meaning; this meant giving the passenger "notice" of the position he was placing himself in by traveling internationally by air. Moreover, it has generally been agreed that the *quid pro quo* for the limitation is, not notice, but liability without fault. Even at the Hague Conference, liability as determined under the "wilful misconduct" provision was linked to the attempts to raise the limitation. Lowenfeld & Mendelsohn at 505. There is no evidence that the treaty drafters and signatories intended "adequate notice" to affect the operation of the treaty limitation.

There is in fact evidence to the contrary. In *Ludecke v. Canadian Pacific Airlines, Ltd.*, 98 D.L.R.3d 52 (C . 1979), *rev'g* 53 D.L.R.3d 636 (Que. C.A. 1974), *aff'g in part and rev'g in part*, 12 Av. Cas. (CCH) 17,191 (Que. Super. Ct. 1971), the reasoning which was developed in *Mertens*, *Warren* and *Lisi* was considered and rejected. In *Ludecke*, the Supreme Court of Canada found:

> [T]he words of art. 3(2) are plain and can admit of no misunderstanding. The absence, irregularity or loss of a passenger ticket will not affect the existence or the validity of the contract of carriage. The benefit of the limitation will be lost only where no ticket is delivered. The American cases referred to above which hold that delivery of a ticket with an irregularity, that is, a statement as required by art. 1(*e*) which is illegible, amounts to no delivery of a ticket, ignore this plain language and fail to give effect to a precise statement of the law. I am unable, however harsh and unreasonable I may consider the limitation, to adopt the American test.

98 D.L.R.3d at 57.

Given the history of discontent with the limitation, it seems that the decisions rendered in these cases were directed toward correcting what is admittedly an inequitable burden as presently borne between carriers and passengers. Instead of giving weight to the history of the Warsaw/Montreal system, the courts have managed to interpret an additional waiver provision into the treaty.

Following the acceptance of the Montreal Agreement and the United States withdrawal of its Notice of Denunciation, the courts have continued to view with disapproval the limitation on air carrier liability. Judicial circumvention of the treaty limitation has taken a slightly different direction upon United States acceptance of the Montreal Agreement. Instead of focusing upon the timing of physical delivery, as in *Warren* and *Mertens*, the *Lisi* concern with the statement, which is never referred to as "notice" in the Convention itself, and the size of the print, increasingly became the focal point for attack.

2. 10-point type size requirement

As early as 1963, before the Montreal Agreement, the Civil Aeronautics Board promulgated regulations for air carriers which required the statement of applicability of the limitation to be printed in at least 10-point modern type size on paper of contrasting color. *See* 14 C.F.R. § 221.175(a). In *Deutsche Lufthansa Aktiengesellschaft v. C.A.B.*, 479 F.2d 912 (D.C. Cir. 1973), this Circuit Court of Appeals rejected the petitioning air car-

rier's argument that promulgation of the C.A.B. regulation conflicted with the Warsaw Convention and exceeded the agency's authority. The Circuit Court first found that the terms of Article 3 do not preclude the addition of more specific requirements regarding the statement. Further, the Court found that "[t]he recent trend of appellate court decisions has been to accord substance to the protections that Article 3 of the Convention intended to provide airline passengers." 479 F.2d at 917. The Court continued to find that "[t]he passenger is to receive full and effective notice of any limitations of liability so that alternative protection may be obtained." *Id.* The *Deutsche Lufthansa* case first determined that the C.A.B. regulations are valid and do not contravene the purposes of the treaty; in making this finding the Circuit also accepted the *Lisi* holding that "unless adequate notice is accorded its passengers, the carrier will later be precluded from using the Convention to limit liability." *Id.* at 918. In dicta surrounding the challenge to the domestic regulation, this Circuit noted that compliance with the regulation will not only provide passengers with adequate notice of the limitations on liability imposed on them but will later enable the carrier to invoke the protection of Article 3(1)(e); however this Circuit did not and has not yet addressed the question of what constitutes "adequate notice."

Having gone beyond the question of whether notice required by the treaty, the question of just what constitutes "adequate notice" was addressed by the Second Circuit in *In re Air Crash Disaster of Warsaw, Poland on March 14, 1980*, 705 F.2d 85 (2d Cir. 1983). Essentially, the Court accepted the premise that the statement *must* provide notice of the limitation in order for the limitation to apply. From this premise, the Court progressed to a determination of "adequate notice." The Second Circuit decided that the "bright line" for "adequacy of notice" should be drawn at the 10-point type requirement found in both the C.A.B. regulation and the

Montreal Agreement. Thus, the 10-point type requirement has been grafted onto the treaty as the next phase in the attempt to circumvent the treaty provision. *In re Air Crash Disaster at Warsaw, Poland, supra*, went so far as to construe the "special contract" that was the Montreal Agreement as part and parcel of the treaty, and indeed, to place that new, "modified" provision just where the courts wanted it to be.

Construing the Article in this way is intended to give it a meaning parallel to that found in American law, but does not accord the treaty provision the meaning evident from the negotiation and debate which led to its promulgation. Nothing in the Montreal Agreement requires that an air carrier provide the statement of liability limitation in 10-point type or lose the benefit of that limitation. Nothing in the debate or dissatisfaction with the limitation which led to the Montreal Agreement confirms the contention that "adequate notice" was an issue. At the core of the debate is dissatisfaction with the very existence of the limitation; the erosion of the circumstances in which carriers may avail themselves of that limitation is the result of judicial frustration at the fact that courts are prevented from fully compensating plaintiffs, especially victims of air tragedies such as presented in this case. This disturbing feature of the treaty has not been eradicated through political process.

While American courts may be justifiably frustrated with the anachronism which the treaty limitation has become, it is not within the province of the judiciary to alter the *quid pro quo* agreed to by the political branches. It has been generally understood that in exchange for virtual strict liability against air carriers, international passengers are limited in their recovery. The "special contract" known as the Montreal Agreement supplemented the *quid pro quo* by raising the amount of the limitation and waiving the carriers' defenses under Article 20 leaving only the presumption of liability. It also

supplemented the Article 3 requirements that a statement be included in the passenger ticket by providing specifics to be provided by carriers stopping in the United States; it did not alter the *quid pro quo* by linking Articles 22 and 20 with Article 3.

In any case, the political branches are vested with the power and authority to make express their intent regarding the enforceability of the treaty limitations in cases where the C.A.B. regulation and Montreal Agreement directive for 10-point type has been violated. However, the United States must be explicit if it is its intent to abrogate the obligation to enforce the treaty limitation in cases such as these Plaintiffs present. The Court notes that were the violation of the regulation for 10-point type and the carrier agreement indeed crucial, a more appropriate sanction would be to prohibit the recalcitrant carriers from engaging in air transportation to or from the United States. While the Government does not have the unilateral power or authority to be rid of the treaty limitation altogether (even the earlier threat of denunciation by the largest participant in international aviation could not accomplish this) the Government could suspend the operating permits of those carriers who do not abide by our domestic laws and regulations. 49 U.S.C. § 1372. The 10-point type size regulation is such a domestic requirement. While the carrie agreed to it in the Montreal Agreement as well, the foreign air carriers are *not* the contracting parties to the treaty. Therefore, Plaintiffs' argument that this carrier was on notice that it would be stripped of limited liability for failing to provide "adequate notice" must fail. While it is indeed correct that the Montreal Agreement must be read in connection with the Warsaw Convention, the resulting Warsaw/Montreal system does not include delimiting liability for failure to provide the statement in 10-point type size. In short, the Montreal Agreement may not be read wholesale into the Warsaw Convention.

Although Plaintiffs derive their argument linking the treaty sanction to the statement from case precedent, the basic flaw in their argument is the assumption that the Montreal Agreement can operate as an amendment to the Warsaw Convention; it cannot. Under the Convention's provisions, the carrier and the passenger may agree to a higher limit of liability. While the limit may be raised, nothing in the "special contract" provision allows it to be completely removed. There is nothing in the "special contract" provision which allows the carrier to waive its defenses under Article 20. However, an express, written agreement to waive those defenses, which the Montreal Agreement contains, should be honored by the courts. Waiver by express agreement is not claimed by these Plaintiffs. Defendant Korean Air Lines, having agreed to the Montreal Agreement, has come forward to make an express denial of waiver in these circumstances. Were the Court faced with a clear, political decision to avoid the treaty limitation where there has not been "adequate notice," however defined, or were it faced with an express waiver, as with the Article 20 defenses, then a different decision would be possible.

Putting aside for the moment the question of whether the Montreal Agreement may amend the treaty, the principal concern in adopting the Agreement was the United States' threat to withdraw from the Convention; notice of the limitation's operation was *not* an issue. Where the political branches have been stymied, "judicial treatymaking" to include notice has proved irresistible to some courts. In the view of this Court, treaty revision is not the right or responsibility of the judicial branch. Moreover, the Executive Branch has recognized the continued vitality of the Warsaw Convention. In its *amicus curiae* brief in the *Franklin Mint* case, the United States cautioned against rendering the treaty limitation entirely unenforceable. While not addressing the exact question which faces this Court, the Government brief noted that "The United States remains committed to the

Convention as the basic instrument governing questions of liability in the international aviation industry." *Amicus Curiae* Brief of the United States at 2. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1984). As the Supreme Court noted in its decision in the case, "when the parties to a treaty continue to assert its vitality a private person who finds the continued existence of the treaty inconvenient may not invoke the doctrine on their behalf." *Id.* at 253. Since the branches of Government vested by the Constitution with the power to make and break treaty obligations continue to assert th utility of the Convention, and to assert the enforceability of the treaty limitation, these private citizens may not, indeed the Court may not, define the treaty limitation out of existence, even in narrow circumstances. That task, difficult though it has proven to be, has been assigned to the legislative and executive branches of our Government.

3. Immediate payment of $75,000

In addition to seeking unlimited liability against Korean Air Lines, Plaintiffs have requested an immediate payment of $75,000 as partial damages. Plaintiffs misconceive the nature of the limitation. The $75,000 limitation on air carrier liability is a maximum, not a minimum, on the amount of damages which a plaintiff may receive, *once he has proven his damages.* While the Montreal Agreement subjects air carriers to virtual strict liability, air carriers are not automatically liable for an amount of $75,000. The limitation does not operate as would insurance; Plaintiffs are still required to prove the amount of their damages and are entitled to receive only the amount which they can prove.

Moreover, the nature and amount of unliquidated damages cannot be proved in a motion for summary judgment. Since the amount of damages must be established on an individual basis, there are still material issues of

fact which remain to be tried. Defendant cannot be precluded from conducting discovery with which to defend against Plaintiffs' claims. There being material issues of fact with respect to the amount of individual damages, it would be entirely inappropriate to award the maximum damages. The request for immediate payment of $75,000 must be denied.

CONCLUSION

"Judicial predilection for their own views as to limitation of liability should not prevail over the limitations fixed by the legislative and executive branches of Government even though this result is obtained by ostensibly adding to the treaty a requirement of actual understanding notice." *Lisi v. Alitalia-Linee Aeree Italiane*, S.p.A., 370 F.2d at 515 (Moore, J., dissenting). The Montreal Agreement is not a negotiated amendment to the Warsaw Convention. Even if the Agreement could rise to the level of an amendment to the treaty, which it cannot, the principle of law requiring clear expression of the intent of the political branches would prevent a finding that the treaty is to be abrogated. Plaintiffs' construction is not supported by the negotiating history of the Warsaw/Montreal system.

It may be arguable that American courts have been justified in arriving at the conclusion that the Montreal Agreement affects the application of the treaty sanction since the Agreement applies only to transportation including the United States; however, such an interpretation rejects the fact of the clear intransigence of a majority of High Contracting Parties to the Convention with regard to delimiting carrier liability. There is every indication that the majority of the more than 120 nations adhering to the Convention intend to continue the special protection afforded international carriers, even at the expense of international passengers. In light of this intransigence, it is especially inappropriate for the Court to

interpret the treaty provisions in such a way as to relieve the United States of its treaty obligations. In addition, the Montreal Agreement contains no expression of the carriers' intent to waive the limitation. In fact, it makes no mention at all of the sanction to be imposed for a carrier's failure to include proper notice to passengers. Making tolerable an intolerable treaty provision is simply not the province of the courts. Therefore, for the foregoing reasons, the motion for partial summary judgment against Korean Air Lines shall be DENIED.

An appropriate Order accompanies this Memorandum.

/s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
Chief Judge

DATE: July 25, 1985

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL No. 565
Misc. Docket No. 83-0345

IN RE: KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1983

Civil Action Nos. 83-2793,
83-2941, 83-3154, 83-3177,
83-3204, 83-3441, 83-3445,
83-3448, 83-3449, 83-3450,
83-3451, 83-3452, 83-3453,
83-3454, 83-3455, 83-3456,
83-3457, 83-3458, 83-3459,
83-3460, 83-3461, 83-3462,
83-3463, 83-3464, 83-3465,
83-3466, 83-3467, 83-3468,
83-3469, 83-3470, 83-3473,
83-3474, 83-3587, 83-3588,
83-3792, 83-3793, 83-3889,
83-3891, 83-3898, 83-3901,
83-3902, 83-3903; 84-0029,
84-0030, 84-0402

ORDER

In accordance with the Memorandum entered this date, it is by the Court this 25th day of July, 1985,

ORDERED, that Plaintiffs' Motion for Partial Summary Judgment Against Defendant Korean Air Lines Co., Ltd. is DENIED; and it is

FURTHER ORDERED, that Korean Air Lines Co., Ltd., is entitled to avail itself of the limitation on dam-

ages provided by the Warsaw Convention and raised to $75,000 by the Montreal Agreement; and it is

FURTHER ORDERED, that Plaintiffs may not receive immediate payment of $75,000, there being material issues of fact with respect to the amount of unliquidated damages.

/s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
Chief Judge

D.H. GINSBURG, *Circuit Judge, concurring*: I join in the court's opinion and add some reflections on the "choice of law" problem in the context of a federal claim transferred under 28 U.S.C. § 1407 from courts in various circuits to a court in another circuit. I write separately to emphasize the practical problems inherent in any resolution of this problem under the statute as written, and to surface preliminarily some ameliorative steps open only to Congress.

I. CONGRESSIONAL INTENT IN SECTION 1407(a)

The problem is simply enough stated. The Second Circuit takes one view of the relevant federal law, this court takes another, and still other circuits have not addressed the question. Cases filed in district courts in the Second Circuit, in this circuit, and in other circuits were consolidated in the district court here for pretrial proceedings under § 1407. On a motion for summary judgment as to all the cases, which view of the applicable federal law is the district court to apply to the cases filed outside this circuit? The New York plaintiffs in this case contend that, under *Van Dusen v. Barrack*,[1] the transferee district court must apply the Second Circuit's interpretation to the cases filed originally in that venue. The court rejects that argument because the *Erie* policies underlying *Van Dusen* do not extend beyond the sta law context of that case.[2] I agree.

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[1] 376 U.S. 612 (1964).

[2] Opinion of the Court, *supra*, at 7. Plaintiffs cite several authorities for the proposition that *Van Dusen* requires a transferee court under section 1407 to apply the case law of the transferor circuit to a transferred case. Plaintiffs' Brief at 7. *See Berry Petroleum v. Adams & Peck*, 518 F.2d 402, 408 n.7 (2d Cir. 1975) ("Since this case was brought in a district court in the Fifth Circuit, the substantive law of that circuit is the law we must consider here."); *In re National Student Marketing Litigation*, 517 F.Supp. 1345, 1346 n.3 (D.D.C. 1981); *In re Haven Industries*, 462 F.2d 172, 179

Quite apart from whether *Van Dusen* is controlling, there are some circumstances in which a federal court is bound to apply the decisions of another circuit, but

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(S.D.N.Y. 1978); *Stirling v. Chemical Bank*, 382 F.Supp. 1146, 1150 n.5 (S.D.N.Y. 1974), *aff'd* 516 F.2d 1396 (2d Cir. 1975); *In re Four Seasons Securities Laws Litigation*, 370 F.Supp. 219, 228 (W.D.Okl. 1974); *In re Plumbing Fixtures Litigation*, 342 F.Supp. 756, 758 (Jud.Pan.Mult.Lit. 1972); *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 309 F.Supp. 1053, 1055 (E.D.Pa. 1969).

The cursory "analysis" employed in the cases amounts to the following. In *Philadelphia Housing Authority*, the parties did not dispute the proposition, and the court cited *Van Dusen* as authority. The issue was disputed in *Plumbing Fixtures*, but the court relied upon *Van Dusen* and *Philadelphia Housing Authority* without analysis. *National Student Marketing*, *Four Seasons*, and *Stirling v. Chemical Bank* merely bootstrapped on *Plumbing Fixtures*, while *Haven Industries* cited *Plumbing Fixtures* as well as the Second Circuit's decision in *Berry Petroleum* (the only court of appeals decision favorable to the New York plaintiffs) which itself cited both *Plumbing Fixtures* and *Van Dusen* without discussion. That these cases fail to acknowledge the differences between the application of state and federal law was also pointed out *In re Pittsburgh & L.E.R. Co. Securities & Antitrust Litigation*, 543 F.2d 1058, 1065 n.19 (3rd Cir. 1976), which particularly undermines the value of *Philadelphia Housing Authority* as precedent on this point. *Berry Petroleum* is also questionable because it fails to address two prior decisions of the Second Circuit that are in direct conflict with it. *See H.L. Green Co. v. MacMahon*, 312 F.2d 650 (1962), *cert. denied*, 372 U.S. 928 (1963); *Ackert v. Bryan*, 299 F.2d 65, 69-70 (1962); *see also Clayton v. Warlick*, 232 F.2d 699, 706 (4th Cir. 1956); *Scheinbart v. Certain-Teed Products Corp.*, 367 F.Supp. 707 (S.D.N.Y. 1973).

Two other cited cases, *In re Air Crash Disaster at Boston, Massachusetts on July 31, 1973*, 399 F.Supp. 1106, 1108 (D. Mass. 1975); *In re Air Crash Disaster Near Hanover, New Hampshire*, 314 F.Supp. 62, 63 (Jud.Pan.Mult.Lit. 1970), are inapposite here; like *Van Dusen*, they involved the issue of which *state* law to apply. *See also In re Nucorp Energy Securities Litigation*, 772 F.2d 1486, 1491-92 (9th Cir. 1985);

they are the rare instances where a preclusion doctrine so requires. The doctrines of *res judicata*, collateral estoppel, and law of the case come to mind. The New York plaintiffs do not, and cannot, however, rely upon any of these doctrines to support application of *Polish Airlines* to their transferred cases.

Consequently, the New York plaintiffs' suggestion that transfer under section 1407(a) presents the type of exceptional circumstance that justifies imposing upon a federal court the duty to accept as binding another circuit's interpretation of federal law would constitute novel departure from the norm of independent judgment. If Congress had intended such a departure, therefore, we should expect to find language in section 1407(a) that mandates, or at least suggests, it. Obviously, Congress could have directed transferee courts to apply the case law of the transferor court. Less directly, Congress could have suggested this practice by transforming the transferee judge into a temporary judge of each transferor court for the purposes of deciding the transferred cases.[8]

In re Eastern Airlines, Inc., Engine Failure, Miami International Airport on May 5, 1983, 629 F.Supp. 307, 315-16 (S.D.Fla. 1986). Judge Weigel cited the federal and state law cases together as supporting the proposition that "the transferee court must apply the substantive law of the transferor forum." Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 584 (1978). *See also* Manual for Complex Litigation, Second § 31.122 at 254 n.25 (1985) ("The transferee judge is bound . . . by the law that would apply in the transferor court, even if the case is later transferred to the transferee court under 28 U.S.C. § 1404").

[8] Congress took this type of approach in Section 1407(b) in apparent recognition that transferee judges, because they often preside over cases from far-flung transferor courts, would of necessity have to perform in unfamiliar roles. In section 1407(b), Congress authorized transferee judges to

We find no such language in section 1407(a), however.[4] Instead, the transfer scheme contemplates that a transferee court will adjudicate transferred cases no differently than cases originally filed before it. This is apparent throughout the scheme, from the point of transfer to the final disposition of the case. Rather than confine the transferee judge merely to presiding over the pretrial phase of cases that may be resolved finally in the transferor courts, section 1407(a) transfers jurisdiction over whole cases to the transferee court; upon transfer, the transferor courts retain no jurisdiction whatsoever.[5]

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order pretrial depositions outside of their normal jurisdiction. As we determined *In re Corrugated Container Antitrust Litigation*, 662 F.2d 875, 880-881 (D.C. Cir. 1981), however, it did so by making the transferee judge, for that purpose, a "temporary judge" of the district court for the district in which the deposition is taken. Congress seemingly could have drafted section 1407(a) also to transform the transferee judge into a judge of each transferor court for purposes of deciding the cases transferred from that court. (Such an approach would still preserve the efficiencies of requiring only one federal judge to become versed in the facts of a controversy.) If Congress also provided for transferor circuit review of such cases, then we might conclude that Congress' intent under such a version of section 1407(a) was for the case law of the transferor court to govern the transferred case.

[4] Section 1407(a) was enacted in 1968, and its legislative history indicates that *Van Dusen*, decided four years earlier, would apply in the pretrial context. *See* Opinion for the Court, *supra*, at n.5. There is no indication, however, that Congress believed that *Van Dusen* extended beyond its own context of federal courts applying state law.

[5] *See Glasstech, Inc. v. AB Kyro OY*, 769 F.2d 1574 (Fed. Cir. 1985); *Astarte Shipping v. Allied Steel & Export Service*, 767 F.2d 86, 87 (5th Cir. 1985); *In re Upjohn Co. Antibiotic Cleocin Products Liability Litigation*, 664 F.2d 114, 118 (6th Cir. 1981); *General Elec. Co. v. Byrne*, 611 F.2d 670, 673 (7th Cir. 1979); *In re FMC Corp. Patent Litigation*, 422 F.Supp. 1163, 1165 (Jud.Pa.Mult.Lit. 1976). *Cf. Starnes v. McGuire*, 512 F.2d 918, 924 (D.C. Cir. 1974) (en banc) (transfer under section 1404(a)).

Indeed, Congress contemplated that transferred cases might never return to the transferor courts, but instead might be settled or resolved by summary judgment in the transferee court,[6] or else transferred under section 1404(a) to that same transferee court for joint trial.[7] In practice, the vast majority of transferred cases are so resolved, and do not return to the transferor courts.[8] Finally, during the period of the 1407(a) transfer, any appeals—interlocutory or after summary judgment—go to the court of appeals for the transferee court, not to the courts of appeals for the transferor circuits.[9] I c:

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[6] *See* Weigel, *supra* note 2, 78 F.R.D. at 582-83; *Pfizer Inc. v. International Rectifier Inc.*, 538 F.2d 180 (8th Cir.), *cert. denied*, 429 U.S. 1040 (1976); *Humphreys v. Tann*, 487 F.2d 666, 668 (6th Cir. 1973), *cert. denied*, 416 U.S. 956 (1974); *In re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973), *cert. denied sub nom. Standard Oil Co. v. Alaska*, 415 U.S. 919 (1974); *Reidinger v. Trans World Airlines, Inc.*, 463 F.2d 1017, 1018 n.2 (6th Cir. 1972).

[7] *See, e.g., In re Air Crash Disaster at John F. Kennedy International Airport on June 24, 1975*, 479 F.Supp. 1118, 1121-22 (E.D.N.Y. 1978), and cases cited; *In re Yarn Processing Patent Validity Litigation*, 472 F.Supp. 174 (S.D.Fla. 1979); *In re Antibiotic Actions*, 333 F.Supp. 299 (S.D.N.Y. 1971).

[8] *See* Weigel, *supra* note 2, 78 F.R.D. at 583, which reports that less than 5 percent of transferred cases return to transferor courts. More recent statistics indicate that t... number may now approximate 25 percent. *See* 1986 Ann.Rep. Director Admin.Off. U.S. Courts 128; Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U.Pa.L.Rev. 595, 700 (1987).

[9] *See Corrugated Container*, 662 F.2d at 88; *Glasstech, Inc. v. AB Kyro OY*, 769 F.2d at 1576-78; *Astarte Shipping v. Allied Steel & Export Service*, 767 F.2d at 87. In a number of other decisions, *see, e.g., Gulf Oil Co. v. Copp Paving Co.*, 419 U.S. 186 (1974), as well as the cases cited *supra* note 6, the authority of the transferee circuit to review a transferee district court's order was assumed *sub silentio*.

see no indication, from the outline of this scheme, that Congress intended for transferee courts to apply to each transferred case the case law of the transferor court, nor any reason why it would so intend.

Before concluding, based on the lack of any evidence to the contrary, that Congress did not intend transferee federal courts to depart from the norm of independent judgment on matters of federal law, one final inquiry is necessary. For we should still hesitate to adhere to that norm if doing so would, for some other reason, frustrate the purpose of section 1407(a) "to promote the just and efficient conduct" of multidistrict actions, and part by "eliminat[ing] the potential for conflicting contemporaneous pretrial rulings by coordinate district and appellate courts." [10]

In order to discern whether the norm of independent judgment would have this result, we may assess its operation in the instant case. To recapitulate the procedural facts a bit, cases from district courts in the First, Second, and Sixth Circuits were transferred to the District Court for the District of Columbia for pretrial proceedings to be conducted jointly with cases filed here. KAL then filed a motion for summary judgment on the issue of damages, arguing that the Warsaw Convention imposed a maximum no-fault liability of $75,000 per passenger. When the motion was filed, only the Second Circuit had spoken on the pertinent question, holding in *Polish Airlines* [11] that an airline that does not give passengers tickets with 10-point type loses the protection

[10] *In re Plumbing Fixtures Cases*, 298 F.Supp. 484, 491-92 (Jud.Pan.Mult.Lit. 1968).

[11] *In re Air Crash Disaster at Warsaw Poland*, 705 F.2d 85 (2d Cir.), *cert. denied sub nom. Polskie Linie Lotnicze v. Robles*, 464 U.S. 845, *reh. denied*, 464 U.S. 978 (1983), *subsequent proceedings*, 748 F.2d 94 (2d Cir. 1984), on appeal after remand, *Harris v. Polskie Linie Lotnicze*, No. 86-2323 slip op. (9th Cir. June 22, 1987).

of the damage ceiling. The other circuits, in particular the District of Columbia, First, and Sixth Circuits, had not yet addressed the issue.[12] Analyzing the Convention for himself, Chief Judge Robinson concluded that *Polish Airlines* was wrongly decided: noncompliance with the "10-point type" rule does not remove the ceiling.

Adhering to the norm of independent judgment, Chief Judge Robinson also determined that his ruling should apply to all of the cases before him, not only to those originally filed here. At least in the first instance, such uniform application of his ruling furthers considerably the efficiency and consistency goals of section 1407(a). All the cases will be governed by one rule as to damages, and they will all proceed in a like direction, rather than being bifurcated into two groups of cases with diverging litigation paths.

The only problem that does seem potentially to arise from this approach involves the eventual appellate review of Chief Judge Robinson's ruling on the Convention. Assuming for the purposes of illustration that interlocutory appeal to this court had not been granted and, furthermore, that the cases would not subsequently terminate for one or another reason in this circuit, then the transferred cases would return to the respective transferor courts for trial. The several courts of appeals, either on interlocutory appeal or on appeal of the final judgment, would in all probability review the course of pretrial proceedings, including Chief Judge Robinson's potentially outcome-determinative ruling on the Conven-

[12] Subsequent to the district court's grant of summary judgment in this case, the Fifth Circuit adopted the *Polish Airlines* rule. *See In re Air Crash Near New Orleans, Louisiana*, 789 F.2d 1092, 1098, *vacated*, 795 F.2d 381 (1986), *aff'd in relevant part*, 821 F.2d 1147 (1987) (*en banc*). As the district court's opinion in this case was not then published, however, the Fifth Circuit discussed only the Second Circuit's decision.

tion. Reversal would be most likely to occur, of course, in the Second Circuit, where his ruling would conflict directly with *Polish Airlines*.

Since this court would still review the cases filed in the District of Columbia, and as confirmed by the court today we do not agree with the *Polish Airlines* decision, the results on appeal would lead to two (or depending upon the views of the First and Sixth Circuits, perhaps more) different holdings on a determinative issue of damages.[13] A series of inconsistent appellate judgments is not a desirable outcome, however, particularly since the result in some cases might be to require renewed pretrial or trial proceedings. This whole course of case development, starting with divergent paths of appeal and ending with either conflicting or duplicative results, would clearly frustrate the primary goals of section 1407 (a) "to promote the just and efficient conduct" of multidistrict actions.

Having a transferee court apply the norm of independent judgment in ruling on transferred cases, therefore, does pose some risk of undermining on appeal the interests served by section 1407(a). The question is therefore whether this potential risk is great enough to frustrate Congress' remedial intent in enacting section 1407(a), and thereby to persuade us that transferee courts must abandon the norm of independent judgment in deciding transferred cases. In this regard, I believe that, although there is some risk of cases unraveling upon review by transferor circuits, it is not significant. First, relatively few cases ever return to the transferor courts.[14] Second, most transferee court rulings will not be outcome-determinative, but instead will involve routine matters, such as discovery orders, that will not provide grounds for a transferor circuit court to reverse a pretrial ruling by the transferee district court.

[13] In other situations, the disputed issue may involve liability.

[14] *See supra* note 8. Of course, fewer cases would be settled and more would return to their transferor courts if the other circuits show themselves ready to reverse transferee courts' pretrial rulings, thus inviting such encore appearances.

Third, as to those few outcome-determinative rulings of the transferee district court, there exists the possibility of interlocutory appeal to the transferee court, pursuant to 28 U.S.C. 1292(b), as indeed occurred in this case. If the transferee circuit reviews such a ruling, it of course would also exercise independent judgment and apply its own precedents rather than those of the transferor circuits. By reviewing the ruling, the transferee circuit probably will have insured that, if the cases are retransfered to the transferor courts, they will not unravel on later appeal. That is because, in contrast to the rulings of the district court under review, the interlocutory decisions of a coordinate court of appeals are likely to be accepted as binding, under the doctrine of law of the case, in the courts of appeals reviewing the final decision of the district court.[15] I therefore believe

[15] No decision of this court has directly resolved the question of how courts should apply the law of the case doctrine after a case is transferred back to a transferor court. *See Int'l Union, UAW v. Donovan*, 756 F.2d 162, 165 n.16 (D.C. Cir. 1985); *Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071, 1082-83 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1181 (1985); *McCandless v. Beech Aircraft Co.*, 697 F.2d 1156 (D.C. Cir. 1983). Our precedents do suggest, however, that the transferor circuit should not disturb the transferee circuit ruling. In *Laffey*, we held that the law of the case doctrine precludes—absent clear error or manifest injustice—our reviewing, on appeal from a final judgment, a previous ruling of this court rendered on interlocutory appeal. The next question is whether the fact of transfer, and the resulting lack of identity of the two appellate courts, would alter our conclusion that an interlocutory appellate ruling is law of the case for the purpose of a subsequent appeal. *Donovan* would seem to reject this possibility by holding that, in the context of a transfer for lack of jurisdiction, the transferee court should not reexamine

that if (1) transferee circuits are receptive to interlocutory appeals involving outcome-determinative rulings by a transferee district court—again, as occurred in this

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the ruling of a transferor court of *coordinate* jurisdiction absent exceptional circumstances. In fact, this principle has been stated by other circuits. *See Kori Corp. v. Wilco Marsh Buggies & Draglines, Inc.*, 761 F.2d 649, 657 (Fed. Cir.), *cert. denied*, 106 S.Ct. 230 (1985); *Central Soya Co., Inc. v. Geo. A. Hormel & Co.*, 723 F.2d 1573, 1580 (Fed. Cir. 1983); *Hayman Cash Register Co. v. Sarokin*, 669 F.2d 162, 169 (3rd Cir. 1982); *Skil Corp. v. Millers Falls Co.*, 541 F.2d 554, 558 (6th Cir.), *cert. denied*, 429 U.S. 1029 (1976). *See also Sentner v. Amtrak*, 540 F.Supp. 557, 558-59 n.3 (D.N.J. 1982); Steinman, *supra note* 73, 135 U.Pa.L.Rev. at 702-03 & n.417; Weigel, *supra* note 5, 78 F.R.D. at 577.

While a transferor court of appeals might disagree with the transferee circuit's reading of the law, there is good reason in this context to accept a reasoned opinion as presenting something less than the clear error or exceptional circumstance that warrant departing from the law of the case doctrine. Chief Judge Robinson well put the case for transferor courts giving preclusive effect to rulings of a transferee court: "if transferor courts were free to readjudicate issues determined by transferee courts, transfers pursuant to 28 U.S.C. § 1407 could become meaningless exercises perpetuating the very duplication they were designed to eliminate." *In re Korean Air Lines Disaster of September 1, 1983*, MDL 565, Civ. No. 83-0345, Order on Remand at 5 (May 7, 1987).

See also In re Multi-Piece Rim Products Liability Litigation, 653 F.2d 671, 678 (D.C. Cir. 1981) ("Proper coordination of complex litigation may be frustrated if other courts do not follow the lead of the transferee court."). *Multi-Piece Rim Products* did not directly address the situation discussed in the text. Instead, it involved whether a pre-transfer order of a transferor district court had preclusive effect, as law of the case, on a transferee district court. *Cf. Blaski v. Hoffman*, 260 F.2d 317, 322 (7th Cir. 1958), *aff'd*, 363 U.S. 335 (1960) (the transferee Seventh Circuit refused to abide by the "erroneous" jurisdictional ruling of the transferor Fifth Circuit; the Supreme Court adopted the Seventh Circuit's view of the merits, but the law of the case issue was not raised to the court, although in *dictum* it suggested that, because the ruling involved the Seventh Circuit's jurisdiction, it would

case as well as in *Polish Airlines*[16]; and if (2) transferor circuits are receptive, on appeal after retransfer, to the law of the case as it was decided in the transferee circuit court, then even a continuing disagreement between the transferee and transferor circuits on the certified issue need not cause particular cases in a multidistrict litigation to come unglued.

As a result, any harm to the interests Congress meant to further in section 1407(a) will be limited to those outcome-determinative rulings of a transferee district court that are not the subject of an interlocutory appe in the transferee circuit, and, assuming that the cases are transferred back to the transferor courts, result in reversals by one or more transferor circuit courts.[17] Whether this harm, which seems likely to be insignificant, is nevertheless great enough that transferee district courts must abandon the norm of independent judgment,

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not be bound by the Fifth Circuit's ruling on that point, 363 U.S. at 340 & n.9); *In re Upjohn Co. Antibiotic Cleocin Products Liability Litigation*, 664 F.2d 114, at 118-20 (6th Cir. 1981); *In re Long Distance Telecommunication Litigation*, 612 F.Supp. 892, 900-03 (E.D.Mich. 1985).

[16] *Polish Airlines*, 705 F.2d at 86 n.2 (a second interlocutory appeal followed—*see* 748 F.2d at 94-95). *See Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. at 192; *In re Western Liquid Asphalt Cases*, 487 F.2d at 192-93; *In re Air Disaster at John F. Kennedy International Airport*, 479 F.Supp. a 1124-29, and cases there cited.

[17] This harm would be further minimized if transferor circuit courts required, as a condition of reviewing a ruling by the transferee district court, that the appellant at least have sought interlocutory appellate review of that ruling while in the transferee circuit. This rule is comparable to that under which an appellate court will decline to reach an issue not raised before the trial court, *see District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1084-85 (D.C. Cir. 1984), and the institutional interests served are similar. In each instance, the rule requires the litigant to raise an issue at a particular stage in the litigation in order to prevent the litigant from, in

depends upon the probable effects of the alternative rule, under which the transferee district court would apply what it believes would be the interpretations of the respective transferor courts.[18] Again, the facts of this case are illustrative.

Under that alternative, Chief Judge Robinson, having determined that KAL's issuance of 8-point type tickets did not remove the limitation on damages provided under the Convention, would then have to determine the scope of his ruling. Certainly it would govern the cases filed in this district originally; no one disputes that proposition. Under the New York plaintiffs' argument, however, the ruling should not govern their cases, because *Polish Airlines* clearly dictates the contrary interpretation of the Convention.

When applied only to the District of Columbia and New York cases, adherence to the case law of the transferor circuit would be a fairly easy procedure for the transferee district court. It is almost a certainty, however, that the bifurcated ruling it produces would place the District of Columbia and New York cases on increas-

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effect, confronting the court on appeal with an issue that has not been sorted out by a court of first instance, thereby creating "'[e]normous confusion and interminable delay.'" *Id.* at 1084, *quoting Johnston v. Reily*, 160 F.2d 249, 250 (D.C. Cir. 1947). In the transfer context, this suggestion would deprive parties who lose before the transferee district court, and anticipate losing as well before the transferee circuit court, of the incentive to avoid interlocutory appeal and to forestall settlement in the hope of having the case retransferred to the circuit whose more favorable case law renders appellate success more likely.

[18] If transferor circuit law were applicable, the transferee district court might also remand the case to the respective transferor districts for resolution of an issue. Depending upon the issue and its disposition, retransfer (even after interlocutory appeal in the transferor circuit) might be in order. The cost and delay of proceeding in this manner undercuts, however, Congress' purpose in enacting section 1407.

ingly divergent courses. The District of Columbia plaintiffs, in conducting discovery, will have to pursue evidence of fault on the part of KAL, whereas the New York plaintiffs would be able to recover without such a showing. The entire course of discovery, and thus the motions that come before Chief Judge Robinson, would differ entirely between what would have become, in effect, two separate groups of consolidated cases. These differences would be further magnified by the vastly different incentives for settlement facing the two groups of plaintiffs. The District of Columbia plaintiffs, having to prove fault, will presumably be more amenable to settlement than would be the New York plaintiffs. All in all, therefore, it is unlikely that the bifurcated ruling would preserve, to any significant extent, either the efficiency or the consistency that section 1407(a) was intended to promote.

Under the New York plaintiffs' rule, therefore, the threat that the Second Circuit would reverse Chief Judge Robinson and thereby unravel the New York cases is averted, in effect, by preemptively unraveling them in the transferee court. This seems to be a high price to pay—a virtual abandonment of the efficiency and consistency goals of section 1407(a)—to protect against a threat, i.e. unraveling in the transferor circuit courts, that could instead be avoided, at no cost to consistency and at much lower cost in efficiency, through interlocutory appeal to the transferee circuit court and subsequent application by the transferor circuit of the law of the case doctrine.

The price that must be paid in abandoning the norm of independent judgment, however, looms even larger when one realizes that the New York plaintiffs have presented us with the deceptively easy alternative by applying *Polish Airlines* to the New York cases, without suggesting to us how the district judge should have ruled with respect to the cases from districts in the First and

Sixth Circuits, which have not decided this issue.[19] In attempting to rule as would a district court in those circuits, he could have simply applied his own ruling to those cases, happy to believe that, if called upon, those circuits would see things his way. Or, taking to heart the New York plaintiffs' contention that, under *Van Dusen*, transfer should result in merely "a change of courtrooms,"[20] he could have seriously attempted to divine how the First and Sixth Circuits might interpret the Convention if called upon to do so.

This enterprise is far more problematic than *Erie*'s familiar requirement that a federal court assume the perspective of the highest court in each transferor state, and anticipate how each one of those courts would decide an issue of state law. As to some *Erie* issues, the transferor states will have significantly different laws; as to others, such as those addressed by the sundry and not entirely "uniform" codes adopted by the several states, there may be only subtle differences, difficult to discern, among them. Regardless of the difficulty, however, the duty of the transferee court under *Van Dusen* and *Erie* is simply to arrive at what it, in good faith, believes to be an accurate statement of each state's law, as applied to the facts before it. When this results in the transferee court rendering different judgments in cases transferred

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[19] We see nothing in section 1407(a) that would justify a transferee court in applying transferor precedent when it is clear, as is *Polish Airlines* in the Second Circuit, but not trying to discern what other transferor circuits would decide when their case law is not as clear on the precise point in question but offers some guidance. Introducing such a distinction would constitute an act of legislation appropriate for Congress, not of interpretation of the existing statute by a court. Hence, either a transferee court must apply its own interpretation of federal law to all transferred cases, or it must attempt to apply what it believes to be each transferor court's probable interpretation. There is no middle road.

[20] 376 U.S. at 639.

from different fora, therefore, it is only because the states in question have exercised their undoubted "right to pursue local policies diverging from those of [their] neighbors."[21]

When we turn to questions involving federal law, the transferee judge's task becomes much more difficult, because here the court deals with a single federal law that can ultimately have only one proper interpretation. For example, in the instant case, a violation of the "10-point type" rule cannot both impose *and* not impose unlimited liability under the Warsaw Convention; eith the Second Circuit or we have interpreted it erroneously.[22] As a result, any attempt by Chief Judge Robinson to predict how the First and Sixth Circuits would interpret the Warsaw Convention on this precise point would necessitate casuistical musings concerning whether another circuit's case law might be read to compel, or even perhaps just to suggest, an interpretation in conflict with his.[23] Such intellectual practices fall within the domain of the sophist, not that of the judge.

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[21] *Klaxon Co. v. Stentor Elec. Mfg. Co., Inc.*, 313 U.S. 487, 496 (1941).

[22] Albeit not necessarily "clearly erroneous" for purposes of the law of the case doctrine. *See* note 15, *supra*.

[23] *See* Marcus, *Conflicts Among Circuits and Transfer Within the Federal Judicial System*, 93 Yale L.J. 677, 713-14 (1984). For the federal-law transfer situation to be analogous to what occurs under *Van Dusen*, in which the federal court assumes the perspective of the transferor state's highest court (i.e. of the supreme interpreter of the state's law), the question in the KAL case would *not* be (as the New York plaintiffs suggest it is)—"how would the other federal circuits interpret the Warsaw Convention?" Rather, the analogous question would be the same one that a circuit court normally poses when addressing an issue of federal law—"how would the U.S. Supreme Court (the supreme interpreter of federal law) interpret the Warsaw Convention?"

The practice suggested by the New York plaintiffs, therefore, differs qualitatively from accepted instances in which a federal court must apply the ruling of another court. Under the preclusion doctrines of res judicata, collateral estoppel, and the law of the case, a court applies a known ruling of another court—usually to the very facts from which it arose. Under the New York plaintiffs' suggestion, however, the transferee district court will often have to engage in pure guesswork in order to apply another circuit's precedents, if any there be, to the unique facts before it. In this respect, they propose a practice that is unprecedented in the context of federal courts interpreting federal law. Furthermore, when the transferee district court will not be able to rely on a decision on point, there is no assurance, try as it might, that it will always be able correctly to predict how an undecided transferor circuit will eventually decide the kind of close issue over which circuits tend to split. As a result, even though abandonment of the norm of independent judgment appears at first glance to provide a way to prevent cases from unraveling after returning to the transferor courts, the effectiveness of that course might be quite limited, in this case perhaps only to the New York cases.

I have undertaken to assess the implications of applying alternative interpretive models—the exercise of independent judgment versus the application of transferor court case law—in order to determine whether, although congressional silence would generally counsel us against doing so, we should nevertheless break with practice by having transferee courts apply transferor circuit case law. Such a break, as I indicated, would be justified only if the exercise of independent judgment would frustrate Congress' remedial purposes in enacting section 1407(a). The analysis of these alternatives, however, tends to confirm that we should adhere to existing practice. The purposes of section 1407(a) would more likely be frustrated,

not when a transferee district court exercises independent judgment, but rather when it attempts to anticipate the various transferor courts.[24]

Section 1407(a) was enacted "to eliminate the potential for conflicting contemporaneous pretrial rulings by coordinate district and appellate courts." [25] Under the New York plaintiffs' rule, however, transfer under section 1407(a) will simply yield "conflicting contemporaneous pretrial rulings" by one judge rather than by many. The transferee judge, on the most insignificant as well as outcome-determinative rulings, will have to wonder whether he or she would rule differently if located instead in one of the transferor circuits. No doubt, a considerable amount of the judge's time will be consumed attempting to determine whether litigants accurately describe differences in other circuits' interpretations of federal law. And, if the judge is persuaded that some difference does or *may* exist, it will be no small task to explain the inconsistent and contradictory rulings.

The conduct of multidistrict litigation, which is invariably time consuming as it is, will grind to a standstill while transferee judges read separate briefs, each based on the case law of a transferor circuit, on a single issue of federal law. Much of the advantage that transfer was intended to produce, and particularly the desiderata of furthering efficiency and preventing inconsistent ruling will be lost by requiring transferee judges to wear a number of judicial hats. It is the prospect of this kind of quagmire that is likely to yield the result feared by the Court in *Van Dusen*—that courts would be "reluctant to grant transfers" and thereby "frustrate the remedial

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[24] *A fortiori*, when it throws up its hands and remands the cases to the transferor courts for determination of the issue. *See* note 18, *supra*.

[25] *In re Plumbing Fixtures Cases*, 298 F.Supp. at 491-92.

purposes of [section 1407]." [26] It may well be preferable to have multidistrict litigation remain dispersed in the courts of origin than to have transferee judges burdened with the hopelessly complex task of sitting as several federal judges at once.[27] Consequently, even though having transferee judges exercise independent judgment may in isolated instances result in an unraveling of a transferred case, I believe that this approach, although not a perfect solution, is by far the less problematic and the more consistent with the intent of Congress in enacting section 1407.

II. Beyond Interpretation

Under section 1407(a), cases involving federal law are transferred from one circuit to another, and are conceivably subject to appellate review in several circuits, at various stages in the litigation. Given these facts, any resolution of the problem of whose case law will be applied entails, under the statute as currently written, some cost in efficiency and consistency; losses are truly unavoidable. They may be minimized, however, and that is why I reject the New York plaintiffs' suggestion, which in addition to exacting a much higher cost also requires federal courts, in the absence of any congressional mandate, to depart completely from the accepted norm of indepenednt circuit interpretation.

In order for cases to be transferred from one circuit to another with a minimum loss of efficiency and con-

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[26] *Van Dusen*, 376 U.S. at 636.

[27] This is particularly the case insofar as the rule applicable to transferee judges under section 1407(a) is applied as well in the analogous context of a transfer under section 1404(a). The prospect of a trial presided over by a judge expected to simulate different district courts throughout as many as twelve circuits is likely to discourage any court from ordering transfer under section 1404(a).

sistency, the only solution is for Congress to amend section 1407(a), as well as section 1404(a),[28] to provide that rulings by a court in one circuit will not be reviewed under the case law of another circuit. In this respect, the options seem to be: (1) adopt the New York plaintiffs' position, and have the law of the transferor court govern a transferred case throughout its disposition; (2) provide that a ruling in a transferred case is to be reviewed, by whatever circuit court, under the case law of the circuit in which the ruling was made; and (3) make transfer comprehensive, extending through trial and appeal in the transferee circuit (applying its transfer circuit precedents, of course). For the reasons I have given, the first option involves considerable costs. Because the transferee court will have to treat cases from different circuits differently, this alternative virtually guarantees the sacrifice of the efficiency and consistency gains that were supposed to result from conducting consolidated pretrial proceedings. Furthermore, it places the transferee district court in the almost impossible position of determining whether courts of appeals in other circuits would disagree in interpreting federal law.

The second option appears to be far more advantageous. Under this scheme, the transferee district court applies its circuit case law—which it knows best—and its own best judgment to all the transferred cases. By treating all the cases similarly, the statutory goals of efficiency and consistency would be immediately furthered. In addition, the risk that these goals would be undermined by a later unraveling of the cases in the transferor courts is substantially lessened. In reviewing a transferee district court's ruling, the transferor circuit courts would all apply the transferee circuit's case law, and in conducting this review they would be aided by the

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[28] *See* note 27, *supra*.

opinion of the transferee district court.[29] (The transferor circuit courts would thus be placed in a far more advantageous position than is the transferee district court under the New York plaintiffs' suggestion, which would often have to engage in pure guesswork, entirely without guidance about how a court in another circuit would rule.) Furthermore, transferor circuit courts are far less likely to reach conflicting conclusions if they all interpret transferee circuit case law than if they each exercise independent judgment. Consequently, unraveling is not likely to occur under this rule.

The second option is also more attractive because it involves a lesser departure from the norm of independent judgment. Whereas a transferee district judge must make frequent rulings, few cases ever return to the transferor courts and—unlike the first option—the second option would not create any greater incentive for a litigant to persist until the case is remanded. Moreover, in only a few of those that do return will the transferor circuit court have to review a ruling of the transferee district judge on an issue of federal law that will create disagreement among the circuits and thereby require the transferor circuit court, in applying transferee circuit case law, to issue a decision that does not reflect its own view.[30]

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[29] It may also be that the transferor circuit courts should afford some deference to the transferee district court's application of transferee circuit case law. *Cf. Bishop v. Wood*, 426 U.S. 341, 345-346 & n.10 (1976); *Abex Corp. v. Maryland Cas. Co.*, 790 F.2d 119, 121 (D.C. Cir. 1986); *Hull v. Eaton*, No. 85-6024 slip. op. at 11-12 n.9 (D.C. Cir. August 4, 1987).

[30] In fact, the litigation that followed the Second Circuit's ruling in *Polish Airlines* illustrates this. As indicated above, *supra* note 16 and accompanying text, *Polish Airlines* was decided on interlocutory appeal from a ruling by the transferee district court. After pretrial proceedings were complete, the cases were remanded to the transferor courts for trial. On appeal from one of these trials, the Ninth Circuit held that calculation of damages was governed by the law of Poland, not that of California. *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000 (9th Cir. 1987). Accordingly, the plaintiffs received $75,399.78 in damages, $10,000 less than they would have received under California law. Given this disposition, it is not surprising that the Ninth Circuit merely mentions the Second Circuit's holding in passing, *id.*, slip op. at 4, since the question of whether the Convention's $75,000 damage litigation applied had become all but irrelevant.

The third option entails all of the benefits of efficiency and consistency and none of the drawbacks of the second option. Insofar as transfer is burdensome for plaintiffs, however, it would tend to magnify their hardship, especially if they are to testify at trial. This detriment may be more or less offset by the reciprocal advantage accruing to a defendant that does not have to defend multiple trials at different places. A risk-averse defendant, on the other hand, might value the diversification of risk attendant to multiple trials, rather than having everything depend—even more than it already does as a result of the relaxation of the mutuality requirement for plaintiffs' use of estoppel—upon the fortuities of a single proceeding. As between the second and third options, therefore, considerable study would be needed in order to make an informed judgment, one that balances the goals of judicial economy and consistency against the distribution of costs imposed on plaintiffs and defendants in the course of realizing those goals.

III. Conclusion

As a court, however, we must address the statute as it is, not as it might be. Nothing in the Supreme Court's opinion in *Van Dusen* nor in the language of section 1407(a) requires a federal court to engage in the unprecedented practice of interpreting federal law through the analytical prism of another circuit's case law. The

New York plaintiffs have not shown, nor can I imagine, how the purposes underlying section 1407(a) would be furthered rather than frustrated by that approach. Under these circumstances, I can see no reason to condemn transferee district courts to perform often futile exercises in mental gymnastics.

Accordingly, I reject the New York plaintiffs' argument and join the court's opinion holding that our interpretation of the Warsaw Convention must be applied to all the cases before us.

Memorandum Opinion of the United States District Court

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

MDL Docket No. 565
Misc. Nos. 83-0345, 83-3448, 83-3450, 83-3454, 83-3457, 83-3458, 83-3459, 83-3463, 83-3465, 83-3466, 83-3469, 83-3470, 83-3473, 83-3792, 83-3890, 83-3898, 83-3902, 83-3903, 83-0029

IN RE:

KOREAN AIR LINE DISASTER OF SEPTEMBER 1, 1983

MEMORANDUM

This matter comes before the Court pursuant to the January 30, 1987 remand of the Court of Appeals for the District of Columbia Circuit. The Court of Appeals, in considering an interlocutory appeal from this Court's denial of Plaintiffs' Motion for Partial Summary Judgment, was unable to determine the precise scope of this Court's Order. The problem centered around the question of whether the principles of *Van Dusen v. Barrack*, 376 U.S. 612 (1964), required the Court to apply Second Circuit precedent to actions originally filed in New York federal courts and then transferred to the District of Columbia pursuant to 28 U.S.C. § 1407(a). The parties have fully briefed this issue and the Court holds that its July 25, 1985 Memorandum and Order applies to all three categories of actions enumerated by the Court of Appeals.

In *Van Dusen v. Barrack*, the Supreme Court held that in diversity actions, changes of venue within the federal system do not change the *state* law which is applied to the cases. The Court wrote that "[a] change of venue under § 1404(a) generally should be, with respect to state law, but a change of

courtrooms." *Van Dusen*, 376 U.S. at 639. The Court based its decision on the principles of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938):

> The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to to a substantially different result.

Van Dusen, 376 U.S. at 638 (quoting *Guaranty Trust Co. v. York*, 326 U.S. 99, 100 (1945). The Court applied this policy to transfers pursuant to 28 U.S.C. § 1404(a) to "ensure that the 'accident' of federal diversity jurisdiction does not enable a party to utilize a transfer to achieve a result in a federal court which could not have been achieved in the Courts of the State where the action was filed." *Id.*

Because the principles underlying *Van Dusen* and *Erie* have at their foundation questions of the application of state law, neither is applicable to the situation presented here which involves conflicts between the Circuits concerning federal law. While it is true that several courts (including this Court) have applied the *Van Dusen* rule to claims involving federal law, they have failed to recognize the significance of this distinction.

"The federal courts comprise a single system applying a single body of law, and no litigant has a right to have the interpretation of one federal court rather than of another determine his case." *H.L. Green Co. v. MacMahon*, 312 F.2d 650, 652 (2d Cir. 1962), *cert. denied*, 372 U.S. 928 (1963) (citations omitted). *See also*, *In re The Pittsburgh*, 543 F.2d 1058, 1065 n. 19 (3d Cir. 1976) ("[I]n theory, at least, federal law, in its area of competence, is assumed to be nationally uniform, whether or not it is in fact.") What this means in practice is that each federal court is bound to apply federal law the way it believes is appropriate. In the case at hand, this meant that the Court was to thoroughly analyze and consider Second Circuit law (and the law of every other Circuit for that matter) but not to blindly accept it. The conclusion of the

Court's analysis on the issue at hand was that for the reasons stated in its July 25, 1985 Memorandum and Order, the Court did not agree with the holding of *In re Air Crash Disaster of Warsaw, Poland, on March 14, 1980*, 705 F.2d 85 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983) and instead applied what it believed to be an accurate interpretation of federal law. This interpretation applied equally to those actions commenced in federal district courts in New York, Michigan, Massachusetts and the District of Columbia.

Plaintiffs argue in their Memorandum that if transferee courts were to consider cases as described above, the uniformity expressed by *Van Dusen* would be destroyed. While this may be true in the short-run, the long-term benefits of each federal court independently considering an issue are substantial. In this way, an issue may be viewed from several unique perspectives. If at the conclusion of these various analyses more than one interpretation of federal law exists, the Supreme Court of the United States can finally determine the issue and restore uniformity in the federal system. The uniformity achieved in this matter is an "informed uniformity" unlike the "blind uniformity" which would result from one court applying the interpretation of another by rote.

Plaintiffs also argue that because the case at hand was transferred to the District of Columbia for a limited purpose and shall be returned to the federal courts in New York, this Court should not create a conflict between the law of the case (which would be the law of this Circuit) and stare decisis (which would instruct the District Courts to follow the decisions of their own Court of Appeals). The Court believes, however, that the law of the case clearly controls this situation. Once a court finally decides any issue of law, the law of the case holds that the ruling should be adhered to by a transferor court. If this were not true, and tranferor courts were free to readjudicate issues determined by tranferee courts, tranfers pursuant to 28 U.S.C. § 1407 could become meaningless exercises perpetuating the very duplication they were designed to eliminate. This is not to say that the parties to an action must suffer for the sake of more efficient proceedings. As previously

stated, if a litigant believes he or she has been denied a favorable and correct interpretation of federal law, the Supreme Court is available to finally decide the question after an application for certiorari. This should be the course of the present litigation.

/s/ AUBREY E. ROBINSON, JR.
Aubrey E. Robinson, Jr.
Chief Judge

DATE: May 7, 1987

Judgment of the Court of Appeals for the District of Columbia Circuit

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1987

Misc. No. 83-00345

No. 85-5982

IN RE: Korean Air Lines Disaster of September 1, 1983

Plaintiff's Steering Committee,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Before:

RUTH B. GINSBURG, WILLIAMS, and D.H. GINSBURG,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam

For The Court

/s/ GEORGE A. FISHER

George A. Fisher
Clerk

Date: September 25, 1987

Opinion for the Court filed by Circuit Judge Ruth B. Ginsburg.

Concurring opinion filed by Circuit Judge D.H. Ginsburg, in which Circuit Judge Williams joins.

Order of the Court of Appeals for the District of Columbia Circuit

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1987

Misc. No. 83-00345

No. 85-5982

[stamped Nov. 16, 1987]

IN RE: Korean Air Lines Disaster of September 1, 1983.

Plaintiffs' Steering Committee,

Appellant.

Before:

Wald, *Chief Judge*; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Bork, Starr, Silberman, Buckley, Williams, D. H. Ginsburg and Sentelle, *Circuit Judges*.

ORDER

The petition of Plaintiffs' Steering Committee for rehearing *en banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the petition for rehearing *en banc* is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, Clerk

BY:/s/ ROBERT A. BONNER
Robert A. Bonner
Deputy Clerk

APPENDIX B

A Convention for the Unification of Certain Rules Relating to International Transportation by Air

WARSAW CONVENTION

Relevant Provisions

CHAPTER II. TRANSPORTATION DOCUMENTS

SECTION I.—PASSENGER TICKET

Article 3

(1) For the transportation of passenger the carrier must deliver a passenger ticket which shall contain the following particulars:

(*a*) The place and date of issue;

(*b*) The place of departure and of destination;

(*c*) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

(*d*) The name and address of the carrier or carriers;

(*e*) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

CHAPTER III. LIABILITY OF THE CARRIER

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily

injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 20

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

Article 22

(1) In the transportation of passengers the liability of the carriers for each passenger shall be limited to the sum of 125,000 francs. Where in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

Agreement Relating to Liability Limitations of the Warsaw Convention and Hague Protocol, Agreement CAB 18900

MONTREAL AGREEMENT

The undersigned carriers (hereinafter referred to as "the Carriers") hereby agree as follows:

1. Each of the Carriers shall effective May 16, 1966, include the following in its conditions of carriage, including tariffs embodying conditions of carriage filed by it with any government:

> "The Carrier shall avail itself of the limitation of liability provided in the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw October 12th, 1929, or provided in the said Convention as amended by the Protocol signed at The Hague September 28th, 1955. However, in accordance with Article 22(1) of said Convention, or said Convention as amended by said Protocol, the Carrier agrees that, as to all international transportation by the Carrier as defined in the said Convention or said Convention as amended by said Protocol, which, according to the Contract of Carriage, includes a point in the United States of America as a point of origin, point of destination, or agreed stopping place
>
> (1) The limit of liability for each passenger for death, wounding, or other bodily injury shall be the sum of US $75,000 inclusive of legal fees and costs, except that, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit shall be the sum of US $58,000 exclusive of legal fees and costs.
>
> (2) The Carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of said Convention or said Convention as amended by said Protocol.
>
> Nothing herein shall be deemed to affect the rights and liabilities of the Carrier with regard to any claim brought by, on behalf of, or in respect of any person who has wilfully caused damage which resulted in death, wounding, or other bodily injury of a passenger."

2. Each carrier shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention, or the Convention as amended by the Hague Protocol, and by the special contract described in paragraph 1, the following notice, which shall be printed in type at least as large as 10 point modern type and in ink contrasting with the stock on (i) each ticket; (ii) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (iii) on the ticket envelope:

> ADVICE TO INTERNATIONAL PASSENGER GN LIMITATION OF LIABILITY
>
> Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of certain (name of carrier) and certain other* carriers parties to such special contracts for death of or personal injury to passengers is limited in most cases to proven damages not to exceed US $75,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers travelling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately US $8,290 or US $16,580.

* Either alternative may be used.

The names of Carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information please consult your airline or insurance company representative.

3. This Agreement shall be filed with the Civil Aeronautics Board of the United States for approval pursuant to Section 412 of the Federal Aviation Act of 1958, as amended, and filed with other governments as required. The Agreement shall become effective upon approval by said Board pursuant to said Section 412.

4. This Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with said Civil Aeronautics Board.

5. Any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to said Civil Aeronautics Board and the other Carriers parties to the Agreement.

Federal Aviation Regulation, 14 C.F.R. § 221.175(a)

Special notice of limited liability for death or injury under the Warsaw Convention. (a) In addition to the aforesaid requirements of this subpart, each air carrier and foreign air carrier which, to any extent, avails itself of the limitation on liability to passengers provided by the Warsaw Convention, shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention and whose place of departure or place of destination is in the United States, the following statement in writing:

Advice to International Passengers on Limitation of Liability

Passengers embarking upon a journey involving an ultimate destination or a stop in a country other than the country of departure are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to their entire journey including the portion entirely within the countries of departure and destination. The Convention governs and in most cases limits the liability of carriers to passengers for death or personal injury to approximately $10,000.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention. For further information please consult your airline or insurance company representative.

Provided, however, That when the carrier elects to agree to a higher limit of liability to passengers than that provided in Article 22(1) of the Warsaw Convention, such statement shall be modified to reflect the higher limit. The statement prescribed herein shall be printed in type at least as large as ten point modern type and in ink contrasting with the stock on (1) each ticket; (2) a piece of paper either placed in the ticket

envelope with the ticket or attached to the ticket; or (3) the ticket envelope: *And provided further*, That a carrier which has heretofore been furnishing a statement including either the sum of "$8,290" or the sum of "$9,000," in place of the sum of "$10,000" in the text of the statement prescribed by this paragraph, may continue to use such statement until July 15, 1974.

Federal Aviation Regulation 14 C.F.R. § 213.7

Filing requirements for adherence to Montreal Agreement.

It shall be a condition upon the holding of a foreign air carrier permit or other authority authorizing direct foreign scheduled air transportation that the holder have and maintain in effect and on file with the Board a signed counterpart of CAB Agreement 18900 (CAB Form 263), and a tariff (for those carriers otherwise generally required to file tariffs) that includes its provisions, and comply with all other requirements of Part 203 of this chapter. That form can be obtained from the Publications Services Division, Civil Aeronautics Board, Washington, D.C. 20428.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1055

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ELISA CHAN, *et al.*,

Petitioners,

v.

KOREAN AIR LINES, LTD.,

Respondent.

MEMORANDUM OF RESPONDENT IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Question Presented for Review

In actions governed by the Warsaw Convention, a treaty of the United States, does the treaty sanction of unlimited liability without fault, set forth in Article 3(2) of the Warsaw Convention, which by its own terms applies only "if a passenger is accepted without a passenger ticket having been delivered", also apply where the delivered passenger ticket contains an Advice as to the applicability of the Warsaw Convention to the transportation which is printed in 8 point rather than 10 point type size as specified in the intercarrier Montreal Agreement?

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Ludecke v. *Canadian Pacific Airlines*, 98 D.L.R.3d 52 (Can. 1979) 2n

Treaties and Other Authorities:

Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. §1502 note (1976) 1n

Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement CAB 18900, approved by CAB Order E-23680, May 13, 1966 (Docket 17325), 31 Fed. Reg. 7302 (1966), *reprinted in* Civil Aeronautics Board, *Aeronautical Statutes and Related Material* 515-16 (1974) 2n

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Respondent Korean Air Lines, Ltd.[1] (hereinafter KAL) has no reasonable basis for opposing certiorari because the decision of the Court below has created a clear conflict among the Circuit Courts of Appeals as to the proper interpretation and meaning of the Warsaw Convention,[2] a treaty of the United States.

---

[1] Correct name, Korean Air Lines Co., Ltd., a subsidiary of which is Korean Air Terminal Service Co., Ltd.

[2] Official Title: Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. §1502 note (1976).

1. Certiorari Should Be Granted to Resolve the Conflict in Decisions of the Circuit Courts of Appeals Created by the Decision Below and the Decision Below Should Be Affirmed

The decision of the Court of Appeals has created a live and direct conflict with prior decisions of the Court of Appeals for the Second Circuit[3] as to the proper interpretation of the Warsaw Convention.

The Court of Appeals below adopted as its own opinion on this issue the comprehensive Memorandum Decision of the District Court for the District of Columbia interpreting the Warsaw Convention and Montreal Agreement.[4] The District Court did not follow by rote the decisions of the Court of Appeals for the Second Circuit but rather conducted an independent and exhaustive analysis of the history of the Warsaw Convention, the language of the Treaty and the Montreal Agreement and the correlation between the Montreal Agreement and the Warsaw Convention. The District Court also gave deference to a decision of the Supreme Court of another Party to the Treaty, Canada, interpreting the same provision of the Warsaw Convention.[5] The District Court concluded that the decisions of the Court of Appeals for the Second Circuit were incor-

[3] *In re Air Crash Disaster at Warsaw, Poland, on March 14, 1980*, 705 F.2d 85 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983); *Lisi* v. *Alitalia-Linee Aeree Italiane*, 370 F.2d 508 (2d Cir. 1966), *aff'd by an equally divided Court*, 390 U.S. 455 (1968).

[4] Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement CAB 18900, approved by CAB Order E-23680, May 13, 1966 (Docket 17325), 31 Fed. Reg. 7302 (1966), *reprinted in* Civil Aeronautics Board, *Aeronautical Statutes and Related Material* 515-16 (1974).

[5] *Ludecke* v. *Canadian Pacific Airlines*, 98 D.L.R.3d 52 (Can. 1979); *In re Korean Air Lines Disaster of September 1, 1983*, 664 F.Supp. 1463, 1474 (D.D.C. 1985), *aff'd*, 829 F.2d 1171 (D.C.Cir. 1987).

rect interpretations of the Warsaw Convention and declined to follow them. The Court of Appeals affirmed this decision of the District Court thereby creating a direct conflict among the Circuits on this issue.

Recognizing this, the Court of Appeals stated that:

> the proper interpretation of the Convention and Agreement, as well as the scope of the transferee court's interpretative authority in a case such as this one, are matters in need of definitive resolution for our national court system.[6]

The Court of Appeals also agreed with the observation of the District Court that

> [i]f . . . more than one interpretation of federal law exists, the Supreme Court of the United States can finally determine the issue and restore uniformity in the federal system. The uniformity achieved in this [way] is an "informed uniformity" unlike the "blind uniformity" which would result from one court applying the interpretation of another by rote.[7]

In not opposing certiorari, KAL emphasizes, respectfully, that the decision of the Court of Appeals is correct in all respects and should be affirmed by the Court.

2. This Is the Appropriate Case in Which to Grant Certiorari Because the Decision Below Has Created the Conflict in Decisions of the Circuit Courts of Appeals

A Petition for a Writ of Certiorari filed on November 6, 1987 in *Pan American World Airways, Inc.* v. *Lopez*, No. 87-750, presents as a secondary question for review the

[6] 829 F.2d 1171, 1176.

[7] *Id.*

same question presented by the Petition herein. The *Lopez* case is not the appropriate case in which to review this question.

The Court of Appeals for the Fifth Circuit in the *Lopez* case merely followed by rote and without any independent analysis and judgment prior precedents of the Court of Appeals for the Second Circuit.[8] Neither the lower court decision nor the decision of the Court of Appeals for the Fifth Circuit in the *Lopez* case provides a dispositive opinion or rationale of benefit to the Court in resolving the conflict created by the decision of the Court of Appeals below.

The Warsaw Convention issue was not raised by Pan American in the *Lopez* case in seeking rehearing in the Court of Appeals for the Fifth Circuit, even though the District Court in the case at bar earlier had rendered its decision on this issue.[9] The impetus for Pan American to include this question in the Petition in the *Lopez* case was the decision of the Court of Appeals below. *See* Application of Pan American World Airways for an Extension of Time in which to file a Petition for a Writ of Certiorari, p. 3, filed October 8, 1987 in the *Lopez* case, in which Pan American stated:

> [T]he recent decision in *Korean Air Lines Disaster, supra,* has created a conflict among the Circuits over

[8] *In re Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982*, 789 F.2d 1092, 1098 (5th Cir. 1986), *reinstated on rehearing en banc*, 821 F.2d 1147, 1169 & 1171 (5th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3401 (Nov. 6, 1987).

[9] The Memorandum Decision of the District Court for the District of Columbia was filed July 25, 1985. 664 F.Supp. 1463. The opinion of the panel of the Court of Appeals for the Fifth Circuit in the *Lopez* case was filed May 7, 1986. 789 F.2d 1092. Rehearing *en banc* was granted in *Lopez* on July 8, 1986. 795 F.2d 381.

> the interpretation of the Warsaw Convention, warranting Pan Am in seeking certiorari on that issue as well as on the *forum non conveniens* issue . . . .

The *Lopez* Petition presents principally a *forum non conveniens* question for review by the Court with the Warsaw Convention issue as an added subsidiary issue.

The decision on the Warsaw Convention issue more appropriate for review by the Court is the decision of the Court of Appeals below which actually brought the Circuits into conflict, especially where, as here, the issue was fully briefed, argued, considered and decided by the District Court and the Court of Appeals.

CONCLUSION

The Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit should be granted and the decision of the Court of Appeals affirmed.

Respectfully submitted,

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Certificate of Service

I hereby certify that I have, this 12th day of January, 1988 served the foregoing Memorandum of Respondent upon Petitioners by depositing three (3) copies of same in a United States mail box at 1251 Avenue of the Americas, New York, New York 10020 with first class postage prepaid, addressed to Milton G. Sincoff, Counsel of Record for Petitioners, Kreindler & Kreindler, 100 Park Avenue, New York, New York 10017 and Donald W. Madole, Speiser, Krause & Madole, 1216 16th Street, N.W., Washington, D.C. 20036.

January 12, 1988

GEORGE N. TOMPKINS, JR.
Counsel for Respondent

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Supreme Court, U.S.
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CLERK

No. 87-1055

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ELISA CHAN, et al.,

Petitioners,

vs.

KOREAN AIR LINES, LTD.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR PETITIONERS

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Plaintiffs' Steering Committee

QUESTION PRESENTED

In death actions governed by the Warsaw Convention Treaty and Montreal Agreement, may the airline have its liability limited to $75,000 where it failed to give the required warning of that limitation to its passengers?

LIST OF PARTIES TO THE PROCEEDING

The following plaintiffs are parties to this proceeding: Elisa Chan, Roberta Cruz, Hans Ephraimson-Abt, Willie James, Dorothy Jones, Michael D. Jones, Betty B. S. Lim, In Jig Lin, Marsha Maikovich, Louella Nassief, Kyung Hwa Park, Barbara Swift, Christina Ting, David WuDunn, Sung Wha Yoo and Marjorie Zicherman. After the motion below was filed, additional actions were commenced and are not formally included in this appeal, but involve the same issue. The plaintiffs in those actions are: Robert Boyar, Evelyn Chauncey, William Cunningham, Lenore Lebow, Katherine McDonald, William Stevens and Terry Weng. The defendant is Korean Air Lines, Ltd.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1055

ELISA CHAN, et al.,

Petitioners,

—v.—

KOREAN AIR LINES, LTD.,

Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (JA 376)[1] is reported at 829 F.2d 1971 (D.C. Cir. 1987). It adopted the first district court opinion (JA 387), reported at 664 F.Supp. 1463 (D.D.C. 1985). The second district court opinion (JA 372) is reported at 664 F.Supp. 1488 (D.D.C. 1987).

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on September 25, 1987. The petition for a writ of certiorari was filed

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1 "JA" refers to the Joint Appendix and "App" refers to the Appendix at the end of this brief.

on December 23, 1987 and granted on April 4, 1988. Jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

PROVISIONS OF LAW INVOLVED

This case involves the Warsaw Convention Treaty,[2] the Montreal Agreement[3] and two Federal Aviation Regulations.[4] Their pertinent provisions are set forth in the appendix to this brief.

STATEMENT OF THE CASE

Petitioners are the surviving family members and estate representatives of eighteen passengers killed in the Korean Air Lines catastrophe of September 1, 1983. KAL flight 7 departed from Kennedy Airport, New York, bound for Seoul, South Korea. Instead of following the prescribed safe route over international waters, the pilots flew the plane more than three hundred miles off course into the airspace and over the land of the Soviet Union. There a

2 A Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), reprinted in 49 U.S.C. § 1502 note. (App 1).

3 Agreement Relating to Liability Limitations of the Warsaw Convention and Hague Protocol, Agreement CAB 18900, Approved by Executive Order E-23680, May 13, 1966 (Docket 17325), 31 Fed. Reg. 7302 (1966), reprinted in Civil Aeronautics Board, *Aeronautical Statutes and Related Material* 515-16 (1974). (App 8).

4 14 C.F.R. § 221.175(a); 14 C.F.R. § 213.7. (App 11, 13).

Soviet military fighter aircraft shot at and struck the KAL plane which crashed, killing all 269 aboard.[5]

Each of these cases is governed by the Warsaw Convention Treaty and the Montreal Agreement. In 1934, the United States became a party to the Treaty. It limited an airline's liability for an international accident to $8,300, provided the airline warned the passenger of the damage limitation.

Over thirty years later, dissatisfaction with the limit caused the United States to announce its withdrawal from the Treaty. Numerous airlines then signed the Montreal Agreement.[6] The Agreement provided for a $75,000 limit, no fault liability and a large print warning of the damage limit. In exchange, the United States continued as a party to the Treaty. A federal regulation also mandated all airlines give the same large print warning. (App 11-12).

KAL failed to give the required warning to the passengers involved in appellants' cases. (JA 12-14, 19, 28-119, 388). But the airline was granted the damage limit by the decision of the court below. (JA 387).

Wrongful death actions were commenced against KAL in various federal district courts, predominantly in New York. Upon KAL's motion, the cases were transferred to the District of Columbia for pretrial discovery proceedings pursuant to 28 U.S.C. § 1407. *In re Korean Air Lines Disaster*, 575 F.Supp. 342 (J.P.M.L. 1983).

5 Only five years earlier, another KAL flight crew committed a similar error with fatal consequences. In April 1978, on a flight from Paris to Seoul, a KAL passenger jet was flown off course into Soviet airspace. It was fired upon by a Soviet fighter, struck and crash landed in Siberia, killing and injuring several passengers. Affidavit of Frank L. Houston dated July 9, 1986, *In re Korean Air Lines Disaster*, M.D.L. No. 565 (D.D.C.).

6 KAL signed in 1969. (JA 19, 21).

On February 15, 1984, the plaintiffs moved for partial summary judgment declaring that KAL was liable for actual damages, having lost the benefit of the Warsaw/Montreal damage limitation by delivering inadequate warnings to twenty-three passengers. (JA 9). Subsequently, five of those actions were dismissed and actions were commenced for the deaths of seven other passengers who received improper warnings.

On July 25, 1985, the district court rendered its memorandum and order denying plaintiffs' motion and declaring that KAL was entitled to the $75,000 damage limit. The issue was certified for appeal and leave to appeal was granted pursuant to 28 U.S.C. § 1292(b). (JA 366-368).

Following oral argument, the Court of Appeals remanded the appeal for further findings on the issue of whether the district court was bound to apply the decisions of the Court of Appeals for the Second Circuit in the eleven death actions originally filed in New York and transferred to the District of Columbia for discovery purposes. (JA 370). On May 7, 1987, the district court ruled that it was not bound by Second Circuit precedent. (JA 372).[7]

On September 25, 1987, the District of Columbia Circuit affirmed, adopting the first district court memorandum as its opinion. (JA 376).

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7 This brief does not address an additional procedural question raised by the decision below: following a transfer for pretrial proceedings under 28 U.S.C. Section 1407, is the transferee court required to apply the substantive federal law existing in the transferor court? This issue is moot because the Court has granted certiorari to decide the Warsaw/Montreal issue. Nevertheless, the procedural question is also the subject of a conflict among the Circuits and the Court may desire to address the issue to provide needed guidance in future cases.

Plaintiffs petitioned this Court for certiorari on December 23, 1987, noting the conflict of the opinion below with decisions of the Second, Fifth, Ninth Circuits and another panel of the District of Columbia Circuit. Certiorari was granted on April 4, 1988.

SUMMARY OF ARGUMENT

The Warsaw Treaty requires an airline deliver to each passenger a ticket warning of the damage limitation. Failure to warn denies the airline the benefit of the limit and allows recovery of actual damages for the passenger's death or injury.

Both the language and intent of the drafters of the Treaty dictate those consequences. The warning was the *quid pro quo* for limited damages and designed to afford the passenger the opportunity to take self-protective measures, such as purchasing accident insurance.

At various times, airlines delivered tickets with small print warnings or while passengers were boarding aircraft. An unbroken line of eight appellate federal and state court decisions over two decades uniformly held those airlines liable for actual, not limited damages for failure to adequately warn the passengers of the Treaty limit.

This Court, in an equally divided ruling, affirmed the Second Circuit holding that an airline which delivered a warning in inadequately sized print could not assert the limitation. *Lisi v. Alitalia-Linee Aeree Italiane*, 370 F.2d 508 (2d Cir. 1966), *aff'd by an equally divided Court*, 390 U.S. 455 (1968) (hereinafter cited as *Lisi v. Alitalia*). With the sole exception of the decision below, *Lisi* has been uniformly followed by United States courts, including the

District of Columbia Circuit. *Deutsche Lufthansa v. Civil Aeronatics Board*, 479 F.2d 912, 917 (D.C.Cir. 1973).

Contrary to all prior United States authority, the court below held that delivery of a ticket invoked the damage limit, irrespective of whether the airline gave any or adequate warning to the passenger. That decision not only contravenes the Convention's language and history, but the airline's contract and a federal regulation as well.

In 1963, the United States established by regulation a uniform minimum standard for the Warsaw damage limitation warning—print of at least 10 point size.

In 1965, our government denounced the Treaty because of its low damage limit. International and domestic airlines then drafted and signed the Montreal Agreement, a special contract applicable only to international transportation involving places in the United States. The Agreement provided for no fault liability for a damage maximum of $75,000.

The airlines further stipulated in the Agreement to provide each passenger with a specific damage limitation warning printed in at least 10 point type. That provision responded to our government's demands that if any arbitrary limit was to apply, passengers must receive a proper notice in large type print before boarding.

Relying on and formally approving the Agreement, the United States cancelled its withdrawal from the Treaty. Although the airlines asserted that the Montreal Agreement would be an interim arrangement lasting several years as a bridge to a new treaty with a higher limit or no limit, the Agreement has remained in effect for over twenty years.

KAL signed the Agreement and was allowed to operate flights in the United States by a permit conditioned upon

compliance with the Agreement. For more than a decade before this crash, KAL was fully aware that its failure to adequately warn would render it liable for actual damages without the arbitrary limit.

Squarely in point are decisions of the Second and Fifth Circuits. *In re Air Crash Disaster at Warsaw, Poland*, 705 F.2d 85 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983) (hereinafter cited as *Polish Airlines*); *In re Air Crash Disaster near New Orleans, Louisiana*, 789 F.2d 1092 (5th Cir.), *reh'g granted*, 795 F.2d 381 (5th Cir. 1986), *reinstated*, 821 F.2d 1147 (5th Cir. 1987) (*en banc*), *petition for cert. filed sub nom., Pan American World Airways v. Lopez*, 55 U.S.L.W. 3369 (U.S. Nov. 6, 1987) (No. 87-750) (hereinafter cited as *Pan American Airways*). Both held that airlines lost the limitation by delivering tickets with warnings printed in smaller than the minimum 10 point size. That minimum standard was properly determined by the Executive Branch, approved by the airlines, has the force of law and implements the Treaty.

A series of other appellate decisions denied the damage limit for an airline's failure to give adequate or timely warning. *Warren v. Flying Tiger Line*, 352 F.2d 494 (9th Cir. 1965); *Mertens v. Flying Tiger Line*, 341 F.2d 851 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965); *Manion v. Pan American World Airways*, 55 N.Y.2d 398, 434 N.E.2d 1060, 449 N.Y.S.2d 693 (1982); *Egan v. Kollsman Instrument Corp.*, 21 N.Y.2d 160, 234 N.E.2d 199, 287 N.Y.S.2d 14 (1967), *cert. denied*, 390 U.S. 1039 (1968).

For the past two decades, nearly all international airlines have complied with their obligations and gained the damage limit by the facile act of adequately warning passengers.

The decision below held that since tickets were delivered, damages were limited and KAL's breach of its con-

tract and violation of the federal regulation were of no consequence in this litigation. That result fails to "give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Air France v. Saks*, 470 U.S. 392, 399 (1985).

The Solicitor General of the United States previously supported the *Lisi* decision of the Second Circuit as well as grant of certiorari and reversal in the actions at bar.

This Court should reverse by virtue of the Treaty's terms and articulated intent; the contractual and regulatory requirements; and to restore the *quid pro quo* relied upon by the United States in continuing with the Warsaw/Montreal system.

ARGUMENT

I

ACTUAL DAMAGES ARE FULLY RECOVERABLE UNLESS THE AIRLINE ADEQUATELY WARNS ITS PASSENGER OF THE WARSAW LIMIT

The Warsaw Convention was concluded in 1929 and signed by the United States in 1934. The aviation industry was then in its infancy with commercial flight viewed as involving substantial risk. A damage ceiling was thought to be necessary to obtain insurance and attract capital. Lowenfeld & Mendelsohn, The United States and the Warsaw Convention, 80 Harv. L. Rev. 497, 498-499 (1967) (hereinafter cited as Lowenfeld).[8] Thus, the Treaty's Article 22 provided for limited recovery for each passenger injury and death of 125,000 French gold francs,

8 The cited law review article was co-authored by Andreas Lowenfeld, Chairman of the United States Delegation to the Montreal Conference in 1966. *Id.* at 497 n.

about $8,300. *See Trans World Airlines v. Franklin Mint*, 466 U.S. 243 (1984).

In return for the damage limit, the Convention imposed a presumption of liability on the airline in Article 17 and required in Article 3 that the airline deliver a ticket to its passenger which contained a statement warning of the limit.

The language and stated intent of the drafters of Article 3 made the damage limit unavailable to an airline which failed to adequately warn the passenger.

At the first drafting session, it was agreed that passengers should be put on an "equal footing" with the airline and informed of the limitation. Conference Internationale de Droite Prive Aerien 56, 78 (Paris 1926) (App 23, 29 translated at App 58, 65).

Block v. Compagnie Nationale Air France, 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968), acknowledged this intent:

> The contract plays a role fundamental to the objectives of the Warsaw Conference. The obligations arising from the contract between the carrier and the passenger carry out *the Conference goal that the rules of limited liability be known to both parties*. This knowledge enables the passenger to determine in advance the amount of insurance he needs [and] permits the carrier's insurer to gauge the carrier's long-term risk, and act accordingly . . . *Id.* at 333-334 (emphasis added).

The warning was characterized by the drafters to be so indispensable and compulsory as to cause the airline to lose the damage limit. Point IV, *infra* at 29 through 36, details the drafting history.

This intent was fulfilled by the language of Article 3. Its subdivision (1) provides that "the carrier *must* deliver a passenger ticket which *shall* contain" five specified particulars (emphasis added). The first four involve insertions for each passenger's personal flight itinerary and details. The last particular is the invariable requirement common to all passengers: "a statement that the transportation is subject to the rules relating to liability established by this convention."

Article 3(2) provides that if the prescribed ticket is not delivered to the passenger, the Convention still applies, but the limitation is unavailable to the airline:

> The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, *if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.* (Emphasis added).[9]

The decision below is the lone deviation from an unbroken line of eight United States appellate court decisions over two decades which uniformly held that an airline's failure to adequately warn a passenger negates the damage

9 Pursuant to the first sentence, where an inadequate ticket is delivered, certain Convention provisions, such as the two year statute of limitations and jurisdictional restrictions, still apply. *See Polish Airlines*, 705 F.2d 85, 91 (2d Cir. 1983); *Molitch v. Irish International Airlines*, 436 F.2d 42 (2d Cir. 1970) (two year statute of limitation imposed under Warsaw Convention regardless of notice provided to passenger). Indeed, many passengers aboard flight 7 received small print tickets, but their families have been barred from suing KAL in United States courts by Article 28's jurisdictional rules.

limit despite delivery of a ticket. *Lisi v. Alitalia*, 370 F.2d 508 (2d Cir. 1966), *aff'd by an equally divided Court*, 390 U.S. 455 (1968); *Pan American Airways*, 789 F.2d 1092, 1098 (5th Cir. 1986); *Polish Airlines*, 705 F.2d 85, 89-91 (2d Cir. 1983); *Deutsche Lufthansa v. Civil Aeronautics Board*, 479 F.2d 912 (D.C. Cir. 1973); *Warren v. Flying Tiger Line*, 352 F.2d 494 (9th Cir. 1965); *Mertens v. Flying Tiger Line*, 341 F.2d 851 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965); *Manion v. Pan American World Airways*, 55 N.Y.2d 398, 434 N.E.2d 1060, 449 N.Y.S.2d 693 (1982); *Egan v. Kollsman Instrument Corp.*, 21 N.Y.2d 160, 234 N.E.2d 199, 287 N.Y.S.2d 14 (1967), *cert. denied*, 390 U.S. 1039 (1968).

These appellate courts held that adequate warning was an indispensable prerequisite for the damage limit and gave the passenger an opportunity to take self-protective measures. With the warning, the passenger could purchase insurance, decline flight or make a "special contract" with the carrier for "a higher limit of liability". Article 22.[10]

Under the decision below, an airline would benefit from the damage limit simply by delivering to its passenger a piece of paper bearing the single word "ticket" or by including a warning in Lilliputian size print. It is fundamental, however, that a treaty, whether construed literally or liberally, should be interpreted to effectuate its evident purposes. *Air France v. Saks*, 470 U.S. 392, 399 (1985); *Bacardi Corp. v. Domenech*, 311 U.S. 150, 163 (1940); *Factor v. Laubenheimer*, 290 U.S. 276, 293-94 (1933); Restatement of Foreign Relations Law § 147 ("International law requires that the interpretative process ascertain and

10 The special contract provision was included in the original 1925 draft of the Convention as a means for the carrier to make insurance available to the passenger. See Point IV, *infra* at 30.

give effect to the purpose of the international agreement . . .''). As this Court has held in interpreting the Warsaw Convention, "it is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Air France v. Saks*, 470 U.S. 392, 399 (1985). Delivery of a ticket without an adequate warning was required by the Treaty's language and history to deny the limitation to the airline. Such a ticket fails to give the passenger an opportunity prior to boarding to take appropriate action.

In *Lisi v. Alitalia*, 370 F.2d 508 (2d Cir. 1966), *aff'd by an equally divided Court*, 390 U.S. 455 (1968), a ticket was delivered with the warning statement in small size print (4 point type). An equally divided Court[11] affirmed the Second Circuit's holding that the "Lilliputian" and "virtually invisible" notice was the equivalent of no notice. *Id.* at 514. The circuit ruled that to allow the airline to deliver such a notice and claim the limitation would render the Treaty's terms meaningless:

> The Convention's arbitrary limitations on liability—which have been severely and repeatedly criticized—are advantageous to the carrier. But the *quid pro quo* for this one-sided advantage is delivery to the passenger of a ticket and baggage check which give him notice that on the air trip he is about to take, the amount of recovery to him or his family in the event of a crash, is limited very substantially. *Id.* at 512-513.

The United States government supported the Second Circuit's holding by stating that *Lisi* accorded "purpose and meaning" to Article 3. Memorandum for *Amicus*

11 Justice Marshall did not participate in the Court's decision, apparently because he filed an *amicus* brief in *Lisi* as Solicitor General. Memorandum for *Amicus* United States (jurisdictional stage), *Lisi v. Alitalia*, 390 U.S. 455 (1968).

United States (jurisdictional stage) at 7, *Lisi v. Alitalia*, 390 U.S. 455 (1968).[12]

Lisi was preceded by *Warren v. Flying Tiger Line*, 352 F.2d 494 (9th Cir. 1965) and *Mertens v. Flying Tiger Line*, 341 F.2d 851 (2d Cir. 1965). In *Warren*, the airline was denied the limitation where passengers were given tickets at the foot of the ramp leading onto the plane:

> None of the passengers were afforded a reasonable opportunity of even reading the ticket, much less obtaining additional insurance, before they were accepted by boarding the plane. The passengers were thereby deprived of a right which was intended to be afforded them as a concomitant to the carrier's right to limit its liability. 352 F.2d at 498.

The Ninth Circuit further observed that a magnifying glass was needed to read the ticket's fine print. 352 F.2d at 497.[13] In *Mertens*, 341 F.2d 851 (2d Cir. 1965), the ticket was delivered to the passenger on the aircraft shortly before take-off. The court held that the airline failed to comply with its Warsaw obligations and lost the benefit of the limitation:

12 With the sole exception of the decision below, *Lisi* has been cited with approval and applied by various United States courts, including the Court of Appeals for the District of Columbia. *Deutsche Lufthansa v. Civil Aeronautics Board*, 479 F.2d 912, 917 (D.C.Cir. 1973); *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193, 1198 n. 11 (3rd Cir. 1978); *Block v. Compagnie Air France*, 386 F.2d 323, 325 n. 2 & 334 n. 32 (5th Cir. 1967).

13 Similarly, in *Manion v. Pan American World Airways*, 55 N.Y.2d 398, 434 N.E.2d 1060, 449 N.Y.S.2d 693 (1982), the highest court of New York State held the limitation inapplicable where the airline did not deliver a ticket until after the passenger completed the first leg of her trip.

> We read Article 3(2) to require that the ticket be delivered to the passenger in such a manner as to afford him a reasonable opportunity to take measures to protect himself against the limitation of liability. . . . The delivery requirement of Article 3(2) would make little sense if it could be satisfied by delivering the ticket to the passenger when the aircraft was several thousand feet in the air. 341 F.2d at 856-857.

The court also based its conclusion that the limitation was inapplicable on the fact that "the statement concerning the limitation of liability was printed in such a manner as to virtually be both unnoticeable and unreadable . . ." *Ibid.*

Following *Lisi*, the New York State Court of Appeals unanimously held that delivery of a small print notice (in 4.5 point type) violated Article 3 as a matter of law and resulted in liability for full damages. *Egan v. Kollsman Instrument Corp.*, 21 N.Y.2d 160, 234 N.E.2d 199, 287 N.Y.S.2d 14 (1967), *cert. denied*, 390 U.S. 1039 (1968). The court found that "[i]n our judgment, a statement which cannot reasonably be deciphered fails of its purpose and function of affording notice and may not be accepted as the sort of statement contemplated or required by the Convention." 21 N.Y.2d at 169, 234 N.E.2d at 202, 287 N.Y.S.2d at 19-20.

Lisi, *Warren*, *Mertens* and *Egan* all involved air crashes occurring before the airlines signed the Montreal Agreement which mandated the form and minimum size of the Article 3 warning statement.

II

HAVING INDUCED THE UNITED STATES TO CANCEL ITS WITHDRAWAL FROM THE TREATY IN EXCHANGE FOR THE MONTREAL AGREEMENT, AIRLINES WERE REQUIRED TO WARN PASSENGERS OF THE DAMAGE LIMIT IN THE SPECIFIED MANNER TO INVOKE THE LIMIT

In November 1965, dissatisfaction with the Warsaw damage limit caused the United States to take the extraordinary step of formally denouncing the Treaty. *Trans World Airlines v. Franklin Mint*, 466 U.S. 243, 252 & n. 22 (1984). Pursuant to Article 39, the withdrawal would take effect six months later. Thereafter, airlines would be liable in the same manner as any tortfeasor for the actual damages caused by negligence.

The justification claimed for the Warsaw limitation three decades earlier was no longer persuasive. Commercial aviation had matured from an uncertain venture into a reliable industry for which insurance was readily available to cover any risk. Lowenfeld, 80 Harv. L. Rev. at 498 & n.3, 566-7. As a corollary to the status achieved by the industry, by the 1960's passengers were "likely to undertake international travel quite casually and without realizing the drastically limited protection . . . compared to that provided by domestic flights." *Egan v. Kollsman Instrument Corp.*, 21 N.Y.2d 160, 171, 234 N.E.2d 199, 204, 287 N.Y.S.2d 14, 21 (1967), *cert. denied*, 390 U.S. 1039 (1968). A series of highly publicized air crashes in which

recoveries were limited to $8,300 galvanized opposition to the Convention.[14]

International airlines were understandably eager to continue the limited liability regime. Efforts to persuade the United States to accept the Hague Protocol of 1955 with its $16,600 damage limit were unavailing. Lowenfeld, 80 Harv. L. Rev. at 515, 541-546.

Under those circumstances, there was insufficient time to prepare a formal treaty before the United States denunciation became effective. *Id.* at 550. Instead, in May 1966, airline representatives from around the world met in Montreal and drafted the Montreal Agreement to induce the United States to cancel its withdrawal from the Treaty. *Id.* at 588-596.

The United States formally accepted the Agreement by an Executive Order and withdrew its denunciation two days before the effective date. 31 Fed. Reg. 7302 (1966), *reprinted in* 28 U.S.C.A. § 1502 note; Lowenfeld, 80 Harv. L. Rev. at 596.

Our government understood that the Agreement was an "interim arrangement" for several years during which a new treaty would be prepared to either increase the $75,000 limit or abandon any damage limit. Lowenfeld,

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14 For instance, singer Jane Froman was seriously injured on a flight to Europe for the U.S.O. and despite extensive injuries and medical bills, her damages were limited to $8,300. *Ross v. Pan American World Airways*, 299 N.Y. 88, 85 N.E.2d 880 (1949), *cert. denied*, 349 U.S. 947 (1955). In the early 1960's, damages were limited to $8,300 for international flights carrying the United States Ice Skating Team and the Atlanta Art Association which crashed, killing all aboard. *Block v. Compagnie Nationale Air France*, 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968); *Kelley v. Societe Anonyme Belge d'Exploitation*, 242 F.Supp. 129 (E.D.N.Y. 1965).

80 Harv. L. Rev. at 602.[15] Based upon the then "available statistics . . . a 75,000 dollar limit per person looks reasonable at this time." *Id.* at 601. Over twenty years have passed, but the "interim" limit remains in effect.[16]

The Agreement applies only to transportation having a place of origin, destination or stopping place in the United States. Thus, the principal beneficiaries are residents of this country where damage recoveries are higher than in other nations.

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15 The State Department press release issued on the day the Notice of Denunciation was filed provided:

> The United States would be prepared to withdraw the notice of denunciation deposited today if prior to its effective date of May 15, 1966, there is a reasonable prospect of an international agreement on limits of liability in international air transportation in the area of $100,000 per passenger or on uniform rules but without any limit of liability, and if, pending the effectiveness of such international agreement, there is a provisional agreement among the principal international airlines waiving the limits of liability up to $75,000 each passenger.

50 Dep't State Bull. 923 (1965). (JA 279). The United States continued as a party to the Treaty not because the damage limitation was needed, but rather to promote international cooperation by uniform transportation rules. Lowenfeld, 80 Harv. L. Rev. at 564 ("While the principle of limited liability had no particular appeal, the maintenance of an international treaty system did.").

16 At the time the Agreement's damage limit was set in 1966, the most current statistics (from 1958 through 1964) showed that the average wrongful death recovery in non-Warsaw aviation accidents was $52,000. Lowenfeld, 80 Harv. L. Rev. at 553. A recent study of the Rand Corp. showed that by the early 1980's, the average wrongful death recovery in airline air crashes increased to about $500,000. National L. J., May 23, 1988, p. 1 (App 100-101). The Rand study found that between 1970 and 1984, the same average was $362,943. *Ibid.*

The Agreement contains the three essential terms demanded by the United States for its continued participation in the limited liability regime: increase of the Warsaw limit to $75,000; waiver of the complete defense available to the carrier under Article 20(1) (that "all necessary measures" were taken to avoid the accident) thus creating no fault liability; and issuance by airlines of a ticket to each passenger containing a uniform Article 3 notice in a minimum 10 point type size print. (App 8, JA 21-23).

To bind the airlines, the Montreal Agreement was framed as a "special contract" under Article 22(1) of the Warsaw Treaty and each carrier was obligated to sign and file the contract with the Civil Aeronautics Board. Lowenfeld, 80 Harv. L. Rev. at 593. As such a contract, the Agreement "incorporates all other provisions of the Convention." *Id.* at 597.

All foreign airlines must sign the Agreement as a condition of their Foreign Air Carrier Permit which allows the conduct of business in the United States. 14 C.F.R. Section 213.7 (App 13). KAL signed the Agreement in 1969 and received a permit. (JA 19, 21, 24).

By the Montreal Agreement, most airlines, including KAL, became contractually bound to the longstanding United States policy: for the unusual Warsaw limitation to apply, the passenger must receive the Article 3 warning in large print. At the Hague Conference in 1955, the American delegate proposed that Article 3 be amended to require a ticket warning measuring at least one half centimeter high—larger than 10 point type. International Conference on Private Air Law, The Hague, 1955, Vol. I, p. 124 (JA 215); Lowenfeld, 80 Harv. L. Rev. at 514.

Montreal's minimum 10 point type requirement in 1966 replicated a 1963 Civil Aeronautics Board regulation. It remains in effect today and continuously required the Article 3 statement be printed in at least 10 point type. 14 C.F.R. § 221.175(a) (App 11).

In proposing the regulation, the CAB foreshadowed the decision a few years later in *Lisi*, observing that the notice then provided by air carriers pursuant to Article 3 "may be inadequate" and that the "type in which the notice is currently printed is too small to alert the passengers to the importance of the matter." 66 Fed. Reg. 3281 (1963); *see* Lowenfeld, 80 Harv. L. Rev. at 512 ("Even if the passenger could read the ticket, he would hunt in vain for warning of the liability limit."). The Board noted that many passengers were unaware of the limitation and the need to obtain insurance. 66 Fed. Reg. 3281 (1963).

The 10 point type requirement was an Executive Branch determination of minimum notice to the passenger. The CAB observed that "[l]esser notice does not suffice to give adequate notice appropriate in the public interest". Memorandum for *Amicus* Civil Aeronautics Board (merits stage) at 9, *Lisi v. Alitalia*, 390 U.S. 455 (1968) (JA 305).

The CAB continued the Treaty's link between the warning and the damage ceiling by imposing the regulation on each "air carrier and foreign air carrier which, to any extent, avails itself of the limitation on liability to passengers provided by the Warsaw Convention." 14 C.F.R. § 221.175(a) (App 11).

III

KAL IS LIABLE FOR ACTUAL DAMAGES WITHOUT ARBITRARY LIMIT BECAUSE IT FAILED TO ADEQUATELY WARN THE PASSENGERS OF THAT LIMIT

Warsaw's Article 3 required KAL to adequately warn its passengers of the damage limit in order to obtain the *quid pro quo* of that limit. KAL's failure to do so should deny it that benefit. Point I, *supra* at 8.

By virtue of the Montreal Agreement, CAB regulation and the foreign air carrier permit, KAL was obligated to warn passengers of the damage limit with the prescribed minimum size print in order to benefit from the limit. KAL's failure to do so should deny it that benefit. Point II, *supra* at 15.

In *Polish Airlines*, 705 F.2d 85 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983), the airline delivered an Article 3 warning to its passengers in small 8.5 point type, violating its Agreement, permit and the regulation. Based on an exhaustive review of the history of the Convention and the Montreal Agreement, the Second Circuit held that Article 3 denied the carrier the limit. *Id.* at 91.

The Fifth Circuit recently reached the same conclusion where the airline delivered a 9 point type warning. *Pan American Airways*, 789 F.2d 1092, 1098 (5th Cir.), *reh'g granted*, 795 F.2d 381 (5th Cir. 1986), *reinstated*, 821 F.2d 1147, 1171 (5th Cir. 1987) (*en banc*), *petition for cert. filed sub nom., Pan American World Airways v. Lopez*, 55 U.S.L.W. 3369 (U.S. Nov. 6, 1987) (No. 87-750).

The decision below granted KAL the limitation despite warnings printed in only 8 point type (JA 12-14, 19, 28-119, 388), smaller than the notices in *Polish Airlines* and *Pan American Airways*.

The only decision cited favorably by the district court below on the ticket issue was a Canadian Supreme Court case. *Ludecke v. Canadian Pacific Airlines*, 98 D.L.R.3d 52 (Can. 1979). But it did not involve a ticket with a stopping place in the United States and, therefore, was not governed by the 10 point requirement imposed by the Agreement and our federal regulation. *Ludecke* did not discuss the drafting history of the Convention and is directly contrary to that history (Point IV, *infra* at 36-37) and the uniform decisions of American courts.

A. The Agreement and regulation have the force of law and implement the Treaty

Warsaw expressly allows supplemental contracts. Article 22(1). The only contracts barred by the Convention are those which "relieve the carrier of liability or fix a lower limit." Article 23. The Treaty's drafters contemplated that the ticket contract would contain additional terms. The Convention's reporter observed that "[n]othing prevents the two parties from making special contracts". Second International Conference on Private Aeronautical Law, Minutes, Warsaw, 1929, p. 160 (R. Horner & D. Legrez trans. 1975) (JA 158). Thus, the Montreal Agreement was authorized by the Warsaw Treaty.

By both the Treaty and federal law, the Executive Branch was authorized to require through approval of the Montreal Agreement and the CAB regulation that airlines deliver the Article 3 notice in a minimum print size. 49 U.S.C. §§ 1302, 1324(a), 1382, 1502; *Trans World Airlines v. Franklin Mint*, 466 U.S. 243 (1984); *Deutsche Lufthansa v. Civil Aeronautics Board*, 479 F.2d 912 (D.C. Cir. 1973).

In *Trans World Airlines v. Franklin Mint*, 466 U.S. 243 (1984), this Court recently upheld another Civil Aeronau-

tics Board regulation which converted the Warsaw's damage limit, expressed in French gold francs into United States dollars:

> The $9.07 per-pound limit . . . represented an Executive Branch determination, made pursuant to properly delegated authority, of the appropriate rate for converting the Convention's liability limits into United States dollars. *We are bound to uphold that determination unless we find it to be contrary to law established by domestic legislation or by the Convention itself. Id.* at 254 (emphasis added).

By the same reasoning, the 10 point type requirement of the Montreal Agreement approved by our government and its federal regulation constituted an Executive Branch determination, pursuant to properly delegated authority, which should be upheld as consonant with the Treaty and federal law.

The print size standard represented the benchmark for which the Executive Branch concluded that lesser notice was insufficient to properly warn passengers. That standard is not unreasonable. Approval by the airlines, including KAL, of the Agreement reinforces this conclusion. As the Second Circuit observed in *Polish Airlines*, "Withdrawal of the Denunciation and the CAB's acceptance of the Montreal Agreement indicates a judgment by at least the executive branch that 10-point type was necessary to provide sufficient notice, and we see no reason to dispute that determination." 705 F.2d at 90.

The Montreal Agreement established a separate liability regime (liability-damages-warnings) for international flights involving the United States. Lowenfeld, 80 Harv. L. Rev. at 596-601. The provisions of the Convention

authorized varying implementation by its member nations. One example is the special contract allowed by Article 22. Another is the CAB interpretation of the Convention's damage limit upheld by this Court and which had been adopted by only one other Warsaw signatory. *Trans World Airlines v. Franklin Mint*, 466 U.S. 243, 257 n.31 (1984). And a third is the 10 point type regulation. It was challenged in *Deutsche Lufthansa v. Civil Aeronautics Board*, 479 F.2d 912 (D.C. Cir. 1973), by the German national airline as contrary to the Convention and the CAB's authority. But the circuit rejected those arguments and ruled that "the provisions of Article 3 may be supplemented by additional regulations" and the 10 point standard "not only does not contradict the provisions of the Warsaw Convention *but actually gives [Article] 3(1)(e) substantive effect*." *Id.* at 916, 918 (emphasis added).

Contrary to the decision below, the same circuit court in *Deutsche Lufthansa* adopted *Lisi v. Alitalia* and stated that the airline's failure to deliver the required warning would result in loss of the damage limit:

> Compliance with the [10 point type] regulation will not only provide passengers with adequate notice of the limitations on liability imposed on them but will later enable the carrier to invoke the protection of [Article] 3(1)(e), for unless adequate notice is accorded its passengers, the carrier will later be precluded from using the Convention to limit liability. *Id.* at 918.

B. Having failed to provide the Article 3 warning in 10 point type print, KAL may not assert the damage limit.

For fourteen years before this catastrophe, KAL stipulated that 10 point type was the minimum required by Article 3. After the catastrophe, KAL should be denied a finding that smaller type constitutes adequate notice.

The airlines, not the passengers, incorporated the 10 point minimum warning into the Montreal Agreement. The United States was induced by the airlines to withdraw its denunciation and continue the limited liability regime. If the Agreement had not been signed, "there would in all probability be no Convention today", *Polish Airlines*, 705 F.2d at 91. And then KAL would be liable for actual damages, not limited to $75,000.

Compliance with the Agreement, an obligation facilely fulfilled by almost all international airlines since 1966, would invoke the limit. Conversely, receipt of the proper warning would bar a claim of its inadequacy to escape the limit. *Deutsche Lufthansa v. Civil Aeronautics Board*, 479 F.2d 912, 918 (D.C. Cir. 1973). The American delegate to the Hague Convention recognized that waiver of the limit for failure to deliver the specified statement was appropriate since it is "so easy for carriers to comply with the notice requirement". International Conference on Private Air Law, The Hague, 1955, Vol. I, p. 128 (JA 221); Brief for United States at 13, *Pan American World Airways v. Lopez*, 55 U.S.L.W. 3369 (U.S. Nov. 6, 1987) (No. 87-750) ("one might expect that the problem is easily eliminated by the consistent use of ten-point type").

The sole purpose of the 10 point warning was to benefit passengers. Certainly, the Warsaw/Montreal warnings are less than ideal. But they are a compromise balancing the need to warn passengers of the anomalous damage ceiling against the inconvenience to airlines in providing

notice.[17] KAL agreed to that need. By denying passengers their benefit, KAL should be denied the related benefit of the damage limit.

The minimum 10 point type standard is no more arbitrary than the $75,000 limit it preserves. In the same vein, the Second Circuit observed in *Polish Airlines*:

> The 10-point guideline is a clear one, and quite easy to follow. To be sure, any such line drawing has an arbitrary air, but [the airline] is a party to the line drawn and it seems to us less arbitrary to accept the 10-point standard than it would be to guess on a case-by-case basis at what constitutes "adequate notice". 705 F.2d at 90 n. 10

Pan American Airways, 789 F.2d at 1098 ("10-point type means exactly that, 10-point type").

To allow an airline to deliver a sub-minimum warning and invoke the limit would nullify the requirement. Indeed, airlines would then receive the limit in the absence of any warning.

The Agreement should have ended all litigation concerning the required Warsaw warning. In 1967, the Solicitor General as an *amicus* in *Lisi* stated that by the Montreal Agreement "the airlines . . . obligated themselves to provide additional '*notice in 10 point type* advising international passengers of the limitations of liability' " and that "[t]he inclusion of that new notice . . . would remedy the inadequacy in notice found by the courts below." Memorandum for *Amicus* United States (jurisdictional stage) at 9, *Lisi v. Alitalia*, 390 U.S. 455 (1968) (emphasis in original).

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17 The framers of the Warsaw Convention expressly rejected a requirement that the passenger prove that his harm was caused by a defective ticket. Point IV, *infra* at 32.

Rather than barring the damage limit, the court below found that a "more appropriate sanction" would be to deny the airline its landing privileges in the United States. (JA 413). Whether that is an appropriate governmental sanction, it is not a reasonable substitute for the fair compensation required by the Treaty and the Agreement when the airline breaches its obligation to adequately warn.

C. KAL's admitted breach of the contract results in loss of the damage limit.

Wholly apart from the requirements of Article 3, loss of the damage limit results from KAL's breach of contract, the Montreal Agreement.

The court below found that KAL's breach of contract was of no consequence in these actions. But after KAL deprived its passengers of their contractual benefit and then culpably contributed to their deaths, only one consequence is equitable and legally sound: KAL should not benefit from its breach by receiving the damage limit.

It is hornbook law that a material breach of contract is cause for equitable relief, including rescission, to restore the parties to the *status quo*. 12 *Williston on Contracts*, § 1455, § 1457, p. 14, 42 (3rd ed. 1970). Breach of the subject contract—the Montreal Agreement—properly results in loss of the damage ceiling. If the United States did not cancel its withdrawal from the Treaty, no limit would exist. By agreeing to the Montreal contract, the airlines induced the United States to continue as a Treaty party and benefit the airlines with a limit.

Adequate warning of the damage limit was a material part of the Montreal contract. The United States repeatedly expressed its dissatisfaction with *any* damage ceiling and demanded in return for one that the airlines agree to warn passengers by the specified notice. Point II, *supra* at

15. Thus, KAL's breach of contract warrants denial of the damage limit benefit to KAL. Recovery of actual damages is the only appropriate equitable relief to restore the *status quo*.

Polish Airlines' rationale is correct: "Passengers were clearly the intended beneficiaries of a contract which specified, inter alia, the notice carriers had to provide if they were to receive the benefit of a limitation of liability." 705 F.2d at 91. The purpose of the 10 point type requirement was to give passengers adequate warning of the limit prior to boarding. That benefit to passengers was thwarted by KAL. It should not benefit from the damage limit after culpably contributing to the deaths of its passengers.

Acceptance of the contract's terms was a condition precedent to the issuance of a foreign air carrier permit which allowed KAL to conduct its business, including the subject flight, in the United States. KAL "cannot now be heard to say that it should not be bound by the 10 point type size requirement." *Polish Airlines*, 705 F.2d at 90.

KAL can hardly claim surprise that its breach of contract would result in loss of the damage limit. That consequence was foreseeable after the 1968 decision by this Court in *Lisi v. Alitalia*. In the following year, KAL signed the contract and became bound by the CAB regulation. It was approved in 1973 by the District of Columbia Circuit in the *Deutsche Lufthansa* case. That court specifically warned airlines that the damage limit would be lost by a notice smaller than the minimum 10 point type size. Many years later and eighteen months before this catastrophe, the district court decided *Polish Airlines*, 535 F.Supp. 833 (E.D.N.Y. 1982).

This long history of strong and repeated warnings to KAL equitably dictate the loss of the damage limit by

KAL's breach of its contract. KAL chose to accept the risk of liability for full damages. And now KAL should bear the damage consequences of its misconduct.

The decision below declared that *Polish Airlines* "abrogated" the Treaty and defined the limitation "out of existence". (JA 415, 416). To the contrary, by allowing KAL to shirk its responsibility to fairly warn and then receive the limit, the court below ignored the language and history of the Convention. Affirmance of that decision would deny passengers adequate warning and allow airlines to violate federal regulation, breach their contract and benefit from the damage limit by giving inadequate warning or no warning at all. Such a result would be bizarre.

IV

THE HISTORY OF THE TREATY DEMONSTRATES THAT THE WARNING WAS A PREREQUISITE FOR THE LIMITATION

The language of Article 3 provided that unless the carrier delivered a passenger ticket with the specified statement, it lost the damage limit. The Convention's history reinforces that language. The drafters intended to alert passengers to the need for insurance and deny the limit to a carrier which delivered a ticket without proper notice. Developments subsequent to the Convention's adoption are corroborative.

A. The Paris Conference of 1925

The drafting of the Warsaw Convention began at the First International Conference on Private Air Law held in Paris in 1925. *See Air France v. Saks*, 470 U.S. 392, 401 (1985).

From the outset, when the initial draft consisted only of a few core provisions, a warning "statement" was required in the passenger ticket. The draft provided:

> The travel-ticket and way-bill shall mention in particular:
>
> * * *
>
> Indication of the legal limit of responsibility and, should the case arise, of the supplemental guarantee given of the carrier, according to Article 7. Conference Internationale de Droite Prive Aerien (Paris 1926), p. 78 (App 29 translated at App 65).[18]

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18 The 1925 draft uses the same French word "indication" for the warning as subparagraph (e) of the final Convention. In 1926, the State Department translated the French "indication"

That provision fulfilled the drafters' intent that passengers should be put on an "equal footing" with the carrier and informed of the Convention's damage limitation. *Id.* at 56, 78 (App 23, 29 translated at App 58, 65).

In *Block v. Compagnie Nationale Air France*, 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968), the court stated that the obligation to deliver a passenger ticket with notice carried out "the Conference goal that the rules of limited liability be known to both parties". *Id.* at 333-334.

The first draft obliged carriers to make insurance coverage above the limit available to each passenger prior to boarding. That coverage could be purchased by entering a "special agreement" with the carrier for a higher limit of liability. Conference Internationale de Droite Prive Aerien (Paris 1926), p. 56, 79 (App 23, 29-30 translated at App 58, 65-66). Indeed, Article 22(1) of the final Convention eventually allowed for a "special contract" to increase the damage limit.

The final Convention omitted any obligation for the carrier to make insurance available thereby leaving passengers to obtain insurance from others.

B. The CITEJA Draft

The final draft of the Convention was prepared by the International Technical Committee of Legal Aeronautical Experts (known as CITEJA) as a result of meetings in April 1927 and May 1928.

The CITEJA draft manifested the intent that unless a warning was provided to the passenger, the carrier could not assert the damage limitation. Comite International

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into English as "indication", but the same word in the official French Convention was later translated as "statement".

Technique D'Experts Juridiques Aeriens, Compte Rendu Provisoire (Third Session, May 1928), p. 25 (App 45-46 translated at App 78-79); Report of Henri DeVos, CITEJA Reporter (September 1928), *translated and reprinted in* Second International Conference on Private Aeronautical Law, p. 247 (R. Horner & D. Legrez trans. 1975) (JA 86).

The draft of Article 3 listed only four "particulars", (a) through (d), for the passenger ticket. They were essentially the same as particulars (a) through (d) in the final Convention: the date and place of issue; the points of departure and destination; the stopping places; and the carrier's name and address. These particulars were personal to each passenger. The notice requirement, however, was *not* listed as a particular in the CITEJA draft. Instead, a separate paragraph provided that the "passenger ticket shall contain, moreover, a clause stipulating that the carriage is subject to the system of liability set forth by the present Convention." Preliminary Draft of the Convention, CITEJA (May 1928), *translated and reprinted in* Second International Conference on Private Aeronautical Law, p. 258 (R. Horner & D. Legrez trans. 1975) (JA 182).

The four particulars were of substantive significance. Warsaw applies only to international transportation and the presence of such transportation is determined by the place of departure and destination "according to the contract made by the parties". Article 1. Thus, Article 3 mandated that those places be listed as particulars on the ticket. Suit may be brought under Article 28 at the place where the contract was made or the carrier's domicile. They are also particulars required by Article 3.

That CITEJA draft then provided for the "sanction"—loss of the damage limit—"[i]f, for international carriage,

the carrier accepts the traveler without having drawn up a passenger ticket, or if the ticket does not contain the particulars indicated hereabove . . ." *Ibid.* (JA 183).

At the 1928 CITEJA conference, the Greek delegate argued that loss of the limit should not be triggered by failure to include one of the particulars, unless it caused damage to the passenger. Comite International Technique D'Experts Juridiques Aeriens, Compte Rendu Provisoire, p. 25 (Third Session, May 1928) (App 44-46 translated at App 78-79).

The Greek proposal was rejected.[19] The Swiss delegate stated that "the Convention must defend itself" and that "if there is omission of one of the required statements, then there is a professional fault and it must involve a sanction". *Ibid.* The CITEJA reporter agreed:

> The Reporter adds that, as just indicated by Mr. Pittard [the Swiss delegate], long prior discussions have led to the text now being proposed; the only practical sanction which has been found is one deriving from the Agreement itself. These omissions which Mr. Youpis [the Greek delegate] considers as slight are not so in fact: All that is indicated as mandatory statements is highly important. *Ibid.*

The reporter further stated that loss of the limit for failure to deliver the specified ticket was an "essential provision". *Ibid.* He observed that CITEJA dismissed proposals which required the passenger to prove that a ticket omission caused injury or that a criminal, rather than a civil sanction should be imposed. *Ibid.*

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19 A similar proposal relating to the air waybill made by the same delegate at the 1927 CITEJA conference was also rejected. Comite International Technique D'Experts Juridiques Aeriens, Compte Rendu, p. 37 (Second Session, April 1927) (App 39 translated at App 74).

C. The Warsaw proceedings of 1929

At the Warsaw Convention, each delegation was asked to submit proposed amendments based on the CITEJA draft. No proposals were made to omit the requirement for delivery of the warning statement as a prerequisite for the damage limit. Second International Conference on Private Aeronautical Law, pp. 269-324 (R. Horner & D. Legrez trans. 1975) (JA 197).

The Greek delegate renewed his proposal that a carrier should not lose the limitation where a clerk made a simple error in filling out the ticket rubrics and the passenger suffered no harm. Second International Conference on Private Aeronautical Law, pp. 303-304 (R. Horner & D. Legrez trans. 1975) (App 92-93). The delegate observed that in most cases the carrier and the passenger would be aware of the travel arrangements, and, for example, the omission of a stopping place would not be of great importance. He suggested that whether the omission of an item resulted in loss of the limitation should be decided on a case-by-case basis by courts. *Ibid.*

The Greek proposal did not involve the warning statement. It would be printed by the carrier on every ticket. The statement could not involve a "simple error" by an employee in completing the information personal to each passenger. At the time of the proposal and during the Convention discussion, the requirement for a warning statement continued to appear in an independent paragraph, *not* one of the four particulars. *Ibid.*[20]

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20 The reporter told the delegates:

> "It's the same text as the draft; there is only the elimination at letter (c) . . . [and] at the last paragraph, elimination of "or if the ticket does not contain the particulars indicated above". *Ibid.*

The Greek proposal was addressed to the Convention during review of Polish proposals to add the passenger's name and address as another particular in a new subparagraph (e). *Id.* at 150 (JA 147-148). The reporter stated:

> These proposals [to add the name and address of the passenger as a particular] were rejected, not that they will not or would not appear on the passengers ticket—in fact, these headings are found thereon. But in the face of an observation of the Greek Delegate, which is as follows—The last paragraph of the article provides for sanctions in the case of the absence of this passenger ticket, or when the passenger ticket does not contain all the particulars indicated, consequently the sanction is too severe when it's a question of a simple omission, of the negligence of an employee of the carrier—the committee allied to this point of view and, in the last paragraph, it eliminated the words: ". . . or if the ticket does not contain the particulars indicated above".
>
> *But the consequence was that it was necessary to be much more severe for particulars imposed on the passenger ticket, and we have retained only the indispensable minimum to be able to consider the carriage as international carriage in the meaning of the Convention. Ibid.* (Emphasis added).

These discussions show that the drafters intended the four particulars to be "indispensable" prerequisites for invoking the limitation. Once again, the reference to a "simple omission" from the ticket was unrelated to the required warning.

The Japanese delegation proposed that the wording of Articles 3 and 4 be clarified to show the drafters' intent that "*the particular of the clause concerning the liability of the carrier is compulsory*". *Id.* at 310 (emphasis added)

(App 93). That proposal was addressed during the discussion of Article 4. *Id.* at 156 (JA 154). The warning statement required for the baggage check was changed from a separate paragraph into subparagraph (h) as another particular. Subsequently, without recorded discussion, the same warning statement in Article 3 was also changed from a separate paragraph into subparagraph (e) as a fifth particular. *Id.* at 195 (App 82-83).

KAL argued below that the limitation was not lost since Article 3 did not contain the express language similar to Article 4 (baggage check) or Article 9 (air waybill) that certain particulars were compulsory. But the drafting history establishes that the framers consistently intended that in order for the damage limit to apply, the warning statement must be made. It was the sole invariable requirement for limiting damages.

The drafters never intended to give less protection to passengers for damages for death than baggage or goods. Had the drafters intended to break the link binding the statement to the limitation, such an intent would have been clearly expressed because linkage had consistently been declared to be essential. The baggage ticket and waybill both link the warning statement to loss of the limitation. The same is obviously true for the passenger ticket.

One year before the United States adhered to the Convention, a commentator wrote that the limitation was lost by omission of any of the particulars listed in Article 3. Y.J. Blanc-Dannery, *Convention de Varsovie* (Paris 1933), p. 28 (App 96-97 translated at App 99); *see Stratis v. Eastern Airlines*, 682 F.2d 406, 411 n. 7 (2d Cir. 1982) ("Why would the treaty writers give less protection to passengers than to baggage or goods? Were not the particular provisions of Article 4(4) and 9 merely a narrowing of the carrier's liability rather than an indication that the treaty-

writers intended to treat passenger tickets as mere formalities except when they omit reference to the limitation provisions?'').

When Article 4 was considered, the drafters indicated that they retained the same sanctions as Article 3, but limited them to only three items, one of which was the required statement:

> On the subject of compulsory particulars, the committee decided to reduce these to a strict minimum . . . The last paragraph was not modified like Article 3; that is to say that *we have retained the same sanctions in the case of errors in the particulars, however, only letters (d), (f) and (h) are now compulsory particulars*. Second International Conference on Private Aeronautical Law, p. 156 (R. Horner & D. Legrez trans. 1975) (emphasis added) (JA 154).

Article 3 establishes a limitation founded on delivery of a meaningful passenger ticket. Since Article 22 provides the carrier and passenger may agree to a special contract to increase the damage ceiling, this provision would lack significance unless the passenger received a warning of the existence of the limit. *Mertens v. Flying Tiger Line*, 341 F.2d 851, 857 (2d Cir. 1965) (''there would be little reason'' for Article 22 ''unless the Convention also required that the ticket be delivered in such circumstances as to afford the passenger a reasonable opportunity to take these self-protective measures.'').

The only case favorably cited by the court below, *Ludecke v. Canadian Pacific Airlines*, 98 D.L.R.3d 52 (Can. 1979), was by a Canadian court which did not address the Convention's history and one important provision. As a result, the case mistakenly construed the language of Article 3(2) which provides that the ''absence, irregularity or loss of the passenger ticket shall not effect

the existence or the [illegible]idity of the contract of transportation''. *Ludecke* held that this provision allowed airlines to deliver an ''irregular'' ticket without a warning statement and benefit from the damage limit. But Warsaw's language and history establish the contrary. *Ludecke* relied on the first sentence of Article 3(2) which provides that the Convention applies to a passenger who receives an irregular ticket. *Ludecke* failed, however, to give effect to the history and language of the next sentence which linked the loss of the damage limitation to the mandatory warning statement specified by Article 3(1).

D. The Hague Convention of 1955

The 1955 Hague Protocol amended Article 3 of the Warsaw Convention to add a provision that an airline's failure to deliver the warning statement resulted in loss of the damage limit. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Done at The Hague on 28 September 1955, 478 U.N.T.S. 371 (JA 252-255). The Hague delegates openly discussed whether the amendment was necessary because the Convention already contained the same provision. International Conference on Private Air Law, The Hague, 1955, Vol. I, p. 125 (JA 216-217).

Alan Goodfellow, representing the International Union of Aviation Insurers, argued that no amendment was needed. He said that in the case of a ''bad carrier'' which issued a ticket purporting to relieve the airline of liability, the Convention already deprived the carrier of the limitation:

> [I]n such a case, a Court would state it was quite clear that the object of Article 3(2) was to ensure that the carrier should deliver a ticket, not necessarily in the precise form laid down by Article 3(1), but giving the

> appropriate information to the passenger to show whether the Convention applied or not, to show against whom the claimant had a right of action, and, generally, to put the claimant in a position to judge his rights and to exercise them. The Court would find that the carrier in this case had completely disregarded his obligations under the Convention and had attempted to evade them. *The Court would hold that this was a clear breach of Article 3 and that the carrier was liable without limit. Ibid.* (emphasis added).

The United States delegation argued successfully at the Hague Conference to maintain the warning statement as a *quid pro quo* of the limitation. *Id.* at 126 (JA 220-221).

Subsequently, the Hague Protocol was rejected by the United States, primarily because its damage limitation of $16,600 was inadequate. *Reed v. Wiser*, 555 F.2d 1079, 1086 (2d Cir. 1977); Lowenfeld, 80 Harv. L. Rev. at 532.

E. The United States position

The United States had an observer present at the Warsaw Convention, but did not participate in drafting the Treaty. Our government, however, has repeatedly expressed its understanding that Article 3 of the Convention requires delivery of the warning statement as a condition of the damage limitation. Memorandum for *Amicus* United States (jurisdictional stage) at 7, *Lisi v. Alitalia*, 390 U.S. 455 (1968); Brief for United States at 12-13, *Pan American World Airways v. Lopez*, 55 U.S.L.W. 3369 (U.S. Nov. 6, 1987) (No. 87-750), supporting grant of certiorari and reversal of the court below in *Chan v. Korean Air Lines*, the actions at bar.

The United States successfully defended the 10 point standard against attack by the airlines. *Deutsche Lufthansa v. Civil Aeronautics Board*, 479 F.2d 912 (D.C. Cir. 1973); Brief for United States at 13, *Pan American World Airways v. Lopez*, 55 U.S.L.W. 3369, (U.S. Nov. 6, 1987) (No. 87-750).

United States appellate courts have uniformly supported the United States position for decades until the decision below. It, for the first time, severed the link between the warning and the damage limit.

CONCLUSION

The opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit should be reversed and remanded with a direction to grant the plaintiffs' motion for partial summary judgment declaring KAL liable for their actual damages not limited to $75,000.

Respectfully submitted,

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Convention for the Unification of Certain Rules Relating to International Transportation by Air

WARSAW CONVENTION

Relevant Provisions

CHAPTER I. SCOPE—DEFINITIONS

Article 1

(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

(2) For the purposes of this convention the expression "international transportation" shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

(3) Transportation to be performed by several successive air carriers shall be deemed, for the purposes of this convention, to be one undivided transportation, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it shall not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party.

CHAPTER II. TRANSPORTATION DOCUMENTS

SECTION I.—PASSENGER TICKET

Article 3

(1) For the transportation of passenger the carrier must deliver a passenger ticket which shall contain the following particulars:

(*a*) The place and date of issue;

(*b*) The place of departure and of destination;

(*c*) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

(*d*) The name and address of the carrier or carriers;

(*e*) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

SECTION II. BAGGAGE CHECK

Article 4

(1) For the transportation of baggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a baggage check.

(2) The baggage check shall be made out in duplicate, one part for the passenger and the other part for the carrier.

(3) The baggage check shall contain the following particulars:

(*a*) The place and date of issue;

(*b*) The place of departure and of destination;

(*c*) The name and address of the carrier or carriers;

(*d*) The number of the passenger ticket;

(*e*) A statement that delivery of the baggage will be made to the bearer of the baggage check;

(*f*) The number and weight of the packages;

(*g*) The amount of the value declared in accordance with article 22(2);

(*h*) A statement that the transportation is subject to the rules relating to liability established by this convention.

(4) The absence, irregularity, or loss of the baggage, check shall not affect the existence or the validity of the contract of transportation which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (*d*), (*f*), and (*h*) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability.

SECTION III. AIR WAYBILL

* * *

Article 8

The air waybill shall contain the following particulars:

(*a*) The place and date of its execution;

(*b*) The place of departure and of destination;

(*c*) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity,

and that if he exercises that right the alteration shall not have the effect of depriving the transportation of its international character;

(*d*) The name and address of the consignor;

(*e*) The name and address of the first carrier;

(*f*) The name and address of the consignee, if the case so requires;

(*g*) The nature of the goods;

(*h*) The number of packages, the method of packing, and the particular marks or numbers upon them;

(*i*) The weight, the quantity, the volume, or dimensions of the goods;

(*j*) The apparent condition of the goods and of the packing;

(*k*) The freight, if it has been agreed upon, the date and place of payment, and the person who is to pay it;

(*l*) If the goods are sent for payment on delivery, the price of the goods, and, if the case so requires, the amount of the expenses incurred;

(*m*) The amount of the value declared in accordance with article 22(2);

(*n*) The number of parts of the air waybill;

(*o*) The documents handed to the carrier to accompany the air waybill;

(*p*) The time fixed for the completion of the transportation and a brief note of the route to be followed, if these matters have been agreed upon;

(*q*) A statement that the transportation is subject to the rules relating to liability established by this convention.

Article 9

If the carrier accepts goods without an air waybill having been made out, or if the air waybill does not contain all the particulars set out in article 8(*a*) to (*i*), inclusive, and (*q*), the carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability.

CHAPTER III. LIABILITY OF THE CARRIER

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 20

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

Article 21

If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

Article 22

(1) In the transportation of passengers the liability of the carriers for each passenger shall be limited to the sum of 125,000 francs. Where in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of

periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French francs consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

Article 23

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention.

Article 28

(1) An action for damages must be brought; at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

(2) Questions of procedure shall be governed by the law of the court to which the case is submitted.

Article 29

(1) The right to damages shall be extinguished if an action is not brought within 2 years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped.

(2) The method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted.

CHAPTER V. GENERAL AND FINAL PROVISIONS

* * *

Article 39

(1) Any one of the High Contracting Parties may denounce this convention by a notification addressed to the Government of the Republic of Poland, which shall at once inform the Government of each of the High Contracting Parties.

(2) Denunciation shall take effect six months after the notification of denunciation, and shall operate only as regards the party which shall have proceeded to denunciation.

Agreement Relating to Liability Limitations of the Warsaw Convention and Hague Protocol, Agreement CAB 18900

MONTREAL AGREEMENT

The undersigned carriers (hereinafter referred to as "the Carriers") hereby agree as follows:

1. Each of the Carriers shall effective May 16, 1966, include the following in its conditions of carriage, including tariffs embodying conditions of carriage filed by it with any government:

> "The Carrier shall avail itself of the limitation of liability provided in the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw October 12th, 1929, or provided in the said Convention as amended by the Protocol signed at The Hague September 28th, 1955. However, in accordance with Article 22(1) of said Convention, or said Convention as amended by said Protocol, the Carrier agrees that, as to all international transportation by the Carrier as defined in the said Convention or said Convention as amended by said Protocol, which, according to the Contract of Carriage, includes a point in the United States of America as a point of origin, point of destination, or agreed stopping place
>
> (1) The limit of liability for each passenger for death, wounding, or other bodily injury shall be the sum of US $75,000 inclusive of legal fees and costs, except that, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit shall be the sum of US $58,000 exclusive of legal fees and costs.
>
> (2) The Carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of said Convention or said Convention as amended by said Protocol.
>
> Nothing herein shall be deemed to affect the rights and liabilities of the Carrier with regard to any claim brought by, on behalf of, or in respect of any person who has wilfully caused damage which resulted in death, wounding, or other bodily injury of a passenger."

2. Each carrier shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention, or the Convention as amended by the Hague Protocol, and by the special contract described in paragraph 1, the following notice, which shall be printed in type at least as large as 10 point modern type and in ink contrasting with the stock on (i) each ticket; (ii) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (iii) on the ticket envelope:

ADVICE TO INTERNATIONAL PASSENGER ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of certain (name of carrier) and certain other* carriers parties to such special contracts for death of or personal injury to passengers is limited in most cases to proven damages not to exceed US $75,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers travelling by a carrier not party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately US $8,290 or US $16,580.

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* Either alternative may be used.

The names of Carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information please consult your airline or insurance company representative.

3. This Agreement shall be filed with the Civil Aeronautics Board of the United States for approval pursuant to Section 412 of the Federal Aviation Act of 1958, as amended, and filed with other governments as required. The Agreement shall become effective upon approval by said Board pursuant to said Section 412.

4. This Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with said Civil Aeronautics Board.

5. Any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to said Civil Aeronautics Board and other Carriers parties to the Agreement.

Federal Aviation Regulation, 14 C.F.R. § 221.175(a)

Special notice of limited liability for death or injury under the Warsaw Convention. (a) In addition to the aforesaid requirements of this subpart, each carrier and foreign air carrier which, to any extent, avails itself of the limitation on liability to passengers provided by the Warsaw Convention, shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention and whose place of departure or place of destination is in the United States, the following statement in writing:

Advice to International Passengers on Limitation of Liability

Passengers embarking upon a journey involving an ultimate destination or a stop in a country other than the country of departure are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to their entire journey including the portion entirely within the countries of departure and destination. The Convention governs and in most cases limits the liability of carriers to passengers for death or personal injury to approximately $10,000.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention. For further information please consult your airline or insurance company representative.

Provided, however, The when the carrier elects to agree to a higher limit of liability to passengers than that provided in Article 22(1) of the Warsaw Convention, such statement shall be modified to reflect the higher limit. The statement prescribed herein shall be printed in type at least as large as ten point modern type and in ink contrasting with the stock on (1) each ticket; (2) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (3) the ticket envelope; *And provided further*, That a carrier which has heretofore been furnishing a statement including either the sum of "$8,290" or the

sum of "$9,000," in place of the sum of "$10,000" in the text of the statement prescribed by this paragraph, may continue to use such statement until July 15, 1974.

Federal Aviation Regulation, 14 C.F.R. § 213.7

Filing requirements for adherence to Montreal Agreement.

It shall be a condition upon the holding of a foreign air carrier permit or other authority authorizing direct foreign scheduled air transportation that the holder have and maintain in effect and on file with the Board a signed counterpart of CAB Agreement 18900 (CAB Form 263), and a tariff (for those carriers otherwise generally required to file tariffs) that includes its provisions, and comply with all other requirements of Part 203 of this chapter. That form can be obtained from the Publications Services Division, Civil Aeronautics Board, Washington, D.C. 20428.

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MINISTÈRE DES AFFAIRES ÉTRANGÈRES

CONFÉRENCE INTERNATIONALE

DE

DROIT PRIVÉ AÉRIEN

(27 OCTOBRE — 6 NOVEMBRE 1925)

PARIS

IMPRIMERIE NATIONALE

1926

A-15

AVANT-PROJET.

ARTICLE PREMIER.

La présente convention est applicable à tout transport par aéronef de voyageurs ou de marchandises avec ou sans transbordement, les points de départ et de destination étant situés dans deux États différents.

Elle ne s'appliquera pas toutefois aux transports réservés à l'Administration des Postes, même dans un seul des États intéressés.

ARTICLE 2.

Le transport international sera constaté par un billet de passage ou une lettre de voiture internationale, mentionnant leas points d'arrivée et de destination et, s'il y a lieu, les points de transbordement.

Ce billet de passage sera toujours nominatif et ne pourra être cédé. La lettre de voiture pourra être établie à personne dénommée, à ordre ou à porteur.

La letter de voiture indiquera notamment la nature et le poids des objets transportés, la déclaration de leur valeur si elle est faite par l'expéditeur, le prix et le mode de fixation du prix de transport et le lieu du payement.

ARTICLE 3.

Le transporteur est responsable des pertes, avaries et retards qui résultent de ses autes personnelles et du vice propre de l'appareil.

Le certificat administratif régulièrement délivré établit une présomption jusqu'à preuve contraire que l'appareil était au départ en bon état de navigabilité.

Le transporteur répond également des fautes commises par ses préposés à l'arrivée et au départ, de la réception, la manutention et la délivrance des marchandises.

ARTICLE 4.

Le transporteur n'est pas responsable des pertes, avaries ou retards:

1° au cas de force majeure en y comprenant les risques de l'air;

2° au cas de faute de voyageur ou du vice propre de la marchandise;

3° au cas de fautes non intentionnelles commises par le pilote ou les agents techniques dans la conduite de l'appareil et les opérations accessoires.

ARTICLE 5.

En aucun cas, la responsabilité de transporteur ne pourra dépasser la somme de dix mille francs par voyageur; toutefois le voyageur pourra en payant une taxe spéciale de garantie se faire garantir contre les risques du transporteur pour une somme déterminée.

Dans le transport des marchandises, la responsabilité du transporteur ne peut dépasser deux cents francs par colis ou unité sauf déclaration spéciale de valeur faite par l'expéditeur, qui aura toute liberté à cet égard.

Les valeurs ci-dessus sont des valeurs or.

ARTICLE 6.

Toute clause qui, dans le billet de passage ou la lettre de voiture, tendrait à exonérer le transporteur de la responsabilité établie dans la présente convention ou à établir une limite de responsabilité autre que celle fixée par l'article précédent sera nulle et de nul effet.

ARTICLE 7.

Au cas de décès du voyageur transporté, l'action en responsabilité ne peut être intentée que par le conjoint et les héritiers en ligne directe, légitimes ou naturels.

ARTICLE 8.

L'action en responsabilité sera portée au choix du demandeur devant le tribunal du lieu de départ ou du lieu de l'arrivée, ou

du lieu de l'accident, au cas d'arrêt de l'aéronef ou en cours de route.

La procédure sera réglée par la loi du tribunal saisi; toutefois, aucune formalité particulière ne peut être imposée au demandeur à raison de sa nationalité.

ARTICLE 9.

L'enlèvement des marchandises sans protestation, par le destinataire, constituera une présomption que les marchandises ont été délivrées en bon état et conformément au titre de transport. Toutefois, au cas d'avaries non apparentes ou de retard, le destinataire aura un délai de trois jours pour protester.

Toute protestation doit être faite par réserves inscrites sur le titre ou par une autre écrit.

ARTICLE 10.

L'action en responsabilité doit être intentée dans le délai d'une année à compter de l'arrivée à destination ou de l'arrêt de l'appareil.

Les causes de suspension et d'interruption de la prescription sont déterminées par la loi du tribunal saisi.

ARTICLE 11.

Les jugements prononcés, contradictoirement ou par défaut, par le juge compétent en vertu des dispositions de la présente convention, seront déclarés exécutoires dans les États signataires de la présente convention sans revision du fond de l'affaire.

ARTICLE 12.

Au cas de transports par aéronefs successifs avec transbordement, le voyageur ne pourra recourir que contre le transporteur qui a causé l'accident par sa faute.

Dans le même cas l'expéditeur de marchandises aura un recours contre *le premier transporteur et le destinataire contre*[1] le dernier et l'un et l'autre pourront en outre agir contre le transporteur qui a causé par sa faute la perte ou l'avarie.

---

1 Note du Secrétaire général. Les mots en italiques avaient été omis par erreur dans le texte d'avant-project distribué par le Gouvernement français; cette omission a été signalée au cours de la conférence par la Délégation française.

RAPPORT.

MONSIEUR LE PRÉSIDENT,

MESSIEURS,

La deuxième Commission a été chargée d'étudier le projet présenté par le Gouvernement français concernant la responsabilité du transporteur aérien. Présidée par le Professeur COGLIOLO, elle a tenu quatre séances consacrées à la discussion des textes; une commission restreinte formée de MM. RIPERT, MEGARRY, ARENDT, SCHREIBER et PITTARD a précisé, en une séance, les textes adoptés par la deuxième Commission.

Qu'il nos soit permis de remercier très sincèrement les auteurs du project français; le texte qui nos a été proposé a largement facilité notre travail et il a servi de base ainsi que de méthode pour l'étude délicate des règles de responsabilité.

Le texte de l'avant-project qui vous est soumis doit être repris en discussion plénière et la deuxième Commission n'entend nullement imposer le résultat de ses délibérations. Elle a formulé des dispositions juridiques qu'il vous est loisible de modifier; elle tient toutefois à vous donner un bref exposé des motifs qui ont dicté son avant-project.

Le transport international.—C'est évidemment un transport qui emprunte le territoire de plusiers pays; mais la se pose une première question: le caractère international est-il déterminé par le *fait* ou par *l'intention* des parties. Un aéronef quittant la France pour le Maroc survole l'Espagne; il est obligé d'atterrir dans ce dernier pays, son voyage prend-il de ce fait un caractère international? Un aéronef partant de France pour L'Angleterre termine son voyage par atterrissage en France; son voyage rentre-t-il dans la conception du droit interne, par le fait qu'il n'a pas passé d'un pays dans un autre?

La Commission a estimé que, pour l'application d'une convention internationale, il était préférable de se baser non pas sur un *fait* peut-être accidentel ou involontaire, mais sur *l'intention* des parties, autrement dit sur le caractère que les parties ont donné librement au contrat de transport au moment de sa conclusion; c'est cette préoccupation qui motive l'alinéa 2 de l'article premier.

Une seconde question concerne la nature même du transport. La plupart des législations admettent que dans les contrats a titre onéreux, la responsabilité est plus grand que dans le contrats gratuits. Il paraît donc utile de faire une distinction entre le transport rémunéré et le transport gratuit; mais d'autre part cette distinction n'exclut pas la fraude et l'on peut concevoir que la responsabilité que nos voulons imposer au transporteur ne soit annulée par une collusion plus ou moins libre donnant au transport le caractère gratuit alors que la rémunération sera stipulée sous une autre forme; enfin le transporteur peut avoir a transporter des passagers au bénéfice de titres de faveur.

Il a paru sage à la Commission d'appliquer la même règle à tous les cas de transport, qu'il y ait ou non rémunération.

On a posé la question du transport amical ou sportif, c'est-à-dire le cas d'un pilote qui emmène un ami à son bord pour une excursion non rétribuée.

Cette question a été résolue en considérant que, dans ce cas, il n'y a pas de contrat de transport et pour bien marquer cette différence, l'article 2 a ajouté le qualificatif "commerciaux".

Cela ne signifie pas qu'il ne soit pas utile de déterminer la responsabilité du transporteur sans contrat; mais la Commission a estimé que cela sortait de son cadre et elle vous propose de le renoyer à la première Commission qui verra à l'inscrire dans le plan général de la réglementation aérienne.

L'article 2 embrasse donc tous les transports commerciaux, quelle que soit la nature de l'aéronef, mais il a excepté les transports postaux parce que ceux-ci sont régis par des conventions spéciales entre États.

La terme "corporation de droit public" peut paraître insolite ou constituer un néologisme; la Commission vois le propose à défaut de mieux, comme comprenant les personnes morales non privées, c'est-à-dire l'État, les communes, les administrations publiques, etc.

Forme du contrat.—Le contrat de transport est-il conventuel ou formel? L'opinion unanime de la Commission est que le contrat est conventuel; mais il y a une grande importance pratique à préciser les conditions du transport notamment pour la preuve éventuelle.

Ainsi avons-nous admis que le titre de transport prévue à l'article 3 constate l'existence du contrat mais ne le constitue pas.

Il faut exiger, dans la pratique, l'établissement d'une billet du passage ou d'une lettre de voiture sans que toutefois l'ommission de ce titre influe sur l'existence du contrat; il faut aussi que l'expéditeur puisse exiger un récépissé de la marchandise et, à cet égard, il semble que le moyen le plus simple réside dans la remise d'un double de la lettre de voiture certifié par signature ou timbre du transporteur.

Ces lois nationales devront pourvoir, par des prescriptions pénales, à ce que ces exigences soient réellement sanctionnées.

Le titre de transport n'est qu'un "instrumentum", mais il a une importance indéniable. Nous avons estimé nécessaire d'en préciser la forme, de façon à faciliter l'adoption d'un modèle unique par les diverses entreprises de transports aériens.

Les mentions que doit contenir le titre de transport sont énumérées à l'article 4; elles ne sont pas limitatives et point n'est besoin d'en justifier l'exigence. Nous n'avons pas précisé les documents qui accompagnent éventuellement la lettre de voiture, car il appartient d'une part à chaque État d'en établir la liste et d'autre part au transporteur de refuser une marchandise sans papiers réguliers. Ici nous posons seulement la règle que la lettre de voiture mentionnera à titre de simple inventaire les documents quels qu'ils soient qui lui seront annexés.

Comme pour le transport par chemin de fer nous avons admis que l'expéditeur répond de l'exactitude des mentions inscrites sur la lettre de voiture et que cette responsabilité sera attestée par la signature de l'expéditeur apposée sur la lettere de voiture.

Responsibilité à raison des accidents, pertes, retard, avaries.—C'est la le point capital de notre projet et nous tenons à répéter ici que le texte qui vous est proposé peut donner lieu à d'amples discussions.

La Commission s'est demandée quel régime de responsabilité il fallait adopter: risque ou faute. L'opinion générale est que, tandis que la responsabilité civile à l'égard des tiers, doit comporter l'application de la théorie du risque, en revanche, dans la

responsabilité du transporteur à l'égard des passagers et des marchandises, il faut admettre la théorie de la faute.

Ce premier point acquis, on peut se demander à qui incombe le fardeau de la preuve; il a paru équitable de ne pas imposer cette lourde charge au lésé et l'on a admis la présomption de faute à la charge du transporteur. Mais comme ce n'est qu'une présomption, le transporteur a évidemment le droit de rapporter la preuve contraire et l'on doit alors établir nettement la limite de la faute; où commence celle-ci?

Que peut-on exiger du transport aérien? Une organisation normale de son exploitation, un choix judicieux de son personnel, une surveillance constante de ses agents et préposés, un contrôle sérieux de ses appariels accessoires et des matières employées.

Il faut bien admettre que celui qui utilise un aéronef n'ignore pas les risques inhérents à un mode de circulation qui n'a pas encore atteint le point de perfection que cent années ont donné aux chemins de fer.

Il est donc juste de ne pas imposer au transporteur une responsabilité absolue et de le dégager de toute responsabilité lorsqu'il a pris les mesures raisonnables et normales pour éviter le dommage; c'est la diligence que l'on peut exiger du bon père de famille.

Dans l'état actuel de l'aéronautique il semble indiqué de s'en tenir là, tout en prévoyant pour un avenir peut-être lointain, une assimilation possible avec la responsabilité du chemin de fer.

Plus délicate encore est la question de la responsabilité du transporteur pour ses préposés.

Le texte qui vous est soumis comporte l'application de deux principes. Le premier est d'une application générale, à savoir que le maître répond des actes de ses préposés; le second, déjà retenu pour la responsabilité du transporteur, c'est qu'il n'ya pas de responsabilité sans faute, celle-ci étant présumée jusqu'à preuve rapportée de la diligence raisonnable.

On peut se demander si la responsabilité du transporteur ne se trouve pas ainsi plus étendue en ce qui touche le préposés que pour lui-même; mais c'est là une simple apparence. En effet, dans les deux cas, il n'y a de responsabilité que s'il y a faute ou

plus exactement si il faut présumée n'a pas été annulée par la preuve que les mesures raisonnables ont été prises pour éviter le dommage; mais, tant que cette preuve n'est pas rapportée, la présomption de faute subsiste et le maître est responsable aussi bien du fait de ses préposés que des siens propres.

Il a paru toutefois nécessaire d'apporter une restriction à cette responsabilité; il faut considérer, dans tout transport, les manœuvres techniques qui touchent à la circulation proprement dite de l'aéronef, et les manipulations commerciales qui ne relèvent pas du droit aérien (emballage, chargement, arrivage, déchargement, conservation de la marchandise soit avant le transport, soit en cas d'interruption, soit à l'arrivée jusqu'à livraison).

Tandis que pour ces dernières manipulations, il n'y a aucun motif de dégager le transporteur de sa responsabilité, en revanche, on peut supprimer la responsabilité du transporteur pour les fautes de navigation de ses préposés s'il prouve qu'il a pris lui-même toutes les measures propres à éviter le dommage. A l'appui de cette disposition, deux arguments principaux se présentent; tout d'abord, il ne faut pas enlever à l'équipage le sentiment de las responsabilité propre, puis il faut admettre qu'en l'état actuel, la circulation aérienne comporte certains risques inhérents à la nature même de ce mode de transport (risque d'air) et que l'expéditeur doit en tenir compte et en prendre sa part.

Limite et exonération de la responsabilité.—Les articles 7 à 9 de l'avant-projet forment un tout et doivent être envisagés dans leur ensemble.

La Commission a adopté le principe fondamental que la clause d'exonération devait être interdite, tant pour les personnes que pour les biens, on a voulu ainsi empêcher des conventions dans lesquelles les parties ne se trouveraient pas à égalité dans la liberté de leur consentement.

L'expéditeur pourrait voir refuser le transport s'il ne souscrivait pas à une clause d'exonération; mais il faut tenir compte aussi, par contre, d'un élément économique important, à savoir que l'exploitant doit pouvoir mesurer la portée des risques qu'il assume; c'est pour satisfaire à cette double exigence que

l'avant-project interdit au transporteur de supprimer ou d'abaisser sa responsabilité au-dessous d'une certaine valeur, et qu'il limite en même temps le maximum de responsabilité du transporteur à 10,000 francs pour les personnes et 200 francs or par colis. Naturellement les parties peuvent élever la valeur de la vie des passagers et des marchandises au-dessus de la limite prévue par l'avant-projet et cela au moyen d'une clause spéciale qui peut être assimilée d'une part à l'assurance pour les personnes et à la déclaration d'intérêt à la livraison pour les choses (analogie avec la Convention de Berne pour les transports par chemin de fer).

Dans ce domaine, une question spéciale s'est posée en ce qui concerne l'action des ayants droit en cas de décès du passager. Ceux-ci agissent-ils comme héritiers ou *jure proprio*? Il y a intérêt à déterminer exactement l'etendue des droits des ayants-cause, car selon les lois nationales, la nature de leurs droits pourrait entrainer une interprétation diverse du fondement juridique et annuler en quelque sorte la limitation fixée par l'avant-projet; comme il est à peu près impossible de fixer dans une formule unique les diverses conceptions juridiques des divers Etats, il a paru plus simple de préciser dans l'article 8 que les ayants-droit seraient déterminés par la loi nationale du défunt, mais que les droits de ces personnes seraient limités à la somme maximale admise par l'article 7.

En résumé, grâce à ce système, le transport aérien jouit d'une protection qu'il n'est pas permis de supprimer et le transporteur peut mesurer nettement ses risques et les couvrir, ce qui a une grande importance pour la fixation des prix de transport et conséquemment pour le développement de la navigation aérienne.

Compétence et juridiction.—L'opinion générale des juristes en matière aérienne est favorable à l'extension des règles de compétence et aucune objection n'a été faite aux dispositions de l'article 8, alinéa, 1 du projet français; la Commission a ajouté le for normal du defendum (*forum rei*).

En ce qui concerne la procédure, il a été émis le vœu que le demandeur ne soit soumis à aucune formalité particulière et à aucune charge spéciale (caution *judicatum solvi*) à raison de sa

nationalité; cette règle a été inscrite à l'article 10, alinéa 2 de l'avant-projet.

L'article 11 prévoit la règle générale en matière de transport pour ce qui touche à la procédure de reconnaissance de la marchandise et n'appelle pas un commentaire spéciale.

L'article 12 limite la durée du délai de recours; le projet français établissait la prescription d'un an et cela a paru normal; mais la diversité des législations en matière d'interruption et suspension, comme aussi la distance possible et présumable en cas de transport aérien, comme enfin la nécessité, en ce qui touche les blessures et l'incapacité des victimes, de permettre une appréciation plus exacte de la portée de la responsabilité, tous ces éléments ont engagé la Commission à élever à deux ans la durée de la prescription.

Il a fallu prévoir l'intervention de plusieurs transporteurs successifs dans les transports continus; la responsabilité, dans ce cas, doit être réglée différemment selon qu'il s'agit d'une personne ou d'une marchandise.

Le principe normal est que la responsabilité incombe au transporteur sur le réseau duquel le dommage s'est produit.

S'il s'agit d'un accident survenu à une personne, il n'y a aucun motif pour ne pas appliquer la règle générale et l'action devra être dirigée contre le transporteur responsable de l'accident. En revanche, la situation est tout autre en ce qui concerne les marchandises; en premier lieu, il n'est pas toujours facile de déterminer quand une avarie s'est produite; en second lieu, chaque transporteur peut vérifier l'état apparent dans lequel se trouve la marchandise au moment où il en prend possession; enfin il y a un mandat dont la marchandise est l'objet (ce qui n'est pas le cas pour le transport des personnes); ce mandat crée une responsabilité collective et solidaire des transporteurs; mais pour éviter toute confusion comme tout abus, l'article 13 dispose que l'expéditeur s'adressera au premier transporteur, le destinataire s'adressera au dernier et l'un et l'autre pourront s'adresser au transporteur sur le réseau duquel l'avarie se sera produite.

Pour compléter les règles touchant la compétence, la Commission a rédigé un article 14 dont la portée est assez sérieuse; cet article interdit toute prorogation de for et toute convention

concernant la loi applicable intervenue au moment de la conclusion du contrat de transport. Le motif est facile à saisir; l'avant-projet fixe des limites de responsabilité, repousse la clause d'exonération, détermine le for de l'action ainsi que le délai de prescription; tout cela forme un ensemble et deviendrait sans utilité si l'un des termes pouvait être modifié par convention particulière; il faut donc interdire la prorogation de for et le choix de la loi applicable comme on interdit la clause d'exonération.

Application de la Convention.—L'article 15 dispose que la Convention s'appliquera dans chaque État contractant à tous les transports internationaux ayant leur point de départ ou leur point d'arrivée dans un État contractant.

Il a été soutenu une opinion diverse exigeant pour l'application de la Convention que les deux Etats fussent contractants; mais cette opinion a été écartée pour les motifs suivants:

1° Il faut que la Convention se généralise le plus possible et pour cela, il est préférable d'étendre plutôt que de restreindre son champ d'application.

2° En raison des motifs développés précédemment et par lesquels le caractère international du transport résulte de l'intention des parties, il suffit que le point de départ se trouve dans un État contractant.

3° Si le point d'arrivée seul se trouve dans un État contractant, il y a utilité très grand tant pour le transporteur que pour l'intéressé au transport à connaître exactement les conditions dans lesquelles la responsibilité existe et s'applique: cela permet à chacun de mesurer ses risques abstraction faite de la loi commune applicable dans le lieu d'arrivée, loi souvent inconnue.

La Commission a limité son étude à responsibilité du transportateur aérien.

Au cours de son travail, elle a noté quelques points qui lui ont paru très importants mais qui échappaient à sa compétence:

1° Il s'agit de déterminer la responsibilité du pilote où du propriétaire dans les cas où le transport ne constitue pas un contrat (transport amical ou sportif).

2° Il s'agit aussi de recommander d'insérer dans les législations nationales les garanties propres à assurer l'application de l'article 3.

3° Il faut aussi réglementer des points qui touchent au transport aérien mais qui ne concernent nullement les risques de l'air: entrepôt des marchandises, avis d'arrivée au destinataire, livraison à domicile, etc.

4° Enfin et surtout la Commission émet le vœu que les Gouvernements réalisent le plus rapidement possible un accord facilitant l'exécution des jugements rendus à l'étranger.

L'avant-projet qui vous est soumis n'est qu'un exposé des principes à adopter, mais si la Conférence estime devoir lui donner la forme d'une Convention internationale, il faudra y ajouter les clauses de durée de la Convention, de dénonciation, de ratification, etc.

Votre rapporteur s'excuse d'avoir retenu si longtemps votre attention; il s'excusera par un mot de J. J. ROUSSEAU: je n'ai pas eu le temps d'être plus bref.

Paris, le 2 novembre 1925.

E. PITTARD,
Rapporteur.

PROJET DE CONVENTION.

.....

également désireux de donner une solution à l'importante question de la responsabilité du transporteur dans les transports internationaux par aéronefs, ont résolu de conclure une Convention et ont, en conséquence, nommé pour leurs Plénipotentiaires, savoir:

.....

lesquels, après s'être communiqué leurs pleins pouvoirs, trouvés en bonne et due forme, sont convenus des dispositions suivantes:

ARTICLE PREMIER.

Est qualifié "transport international", au sens de la présente Convention, tout transport dans lequel, d'après les stipulations des parties, le point de départ et le point de destination sont situés dans deux Etats différents, qu'il y ait ou non interruption de transport ou transbordement.

ARTICLE 2.

Le présente Convention s'applique aux transports internationaux par aéronefs de caractère commercial, effectués avec ou sans rémunération, y compris ceux qui sont effectués par l'État et les personnes juridiques de droit public.

Sont exceptés de l'application de la présente Convention les transports postaux effectués sous l'empire des conventions postales internationales.

ARTICLE 3.

Le transport international sera constaté par un billet de passage ou une lettre de voiture.

Le transporteur sera tenu, à la demande de l'expéditeur, de lui délivrer un double de la lettre de voiture dûment certifié.

L'absence, l'irrégularité ou la perte du titre de transport ne préjudicie ni à l'existence ni à la validité du contrat de transport.

ARTICLE 4.

Le billet de passage et la lettre de voiture mentionneront notamment:

Les points de départ et de destination,

l'itinéraire à suivre,

le nom et l'adresse du transporteur,

le prix du transport, la date et le lieu du payement,

l'indication de la limite légale de responsabilité, et, s'il y a lieu, de la garantie supplémentaire du transporteur suivant l'Article 7,

le lieu et la date de l'émission.

La lettre de voiture indiquera, en outre, notamment:

le nom et l'adresse de l'expéditeur et du destinataire,

le délai de transport, s'il est stipulé,

la nature de la marchandise et le mode d'emballage,

le nombre, les marques, les numéros et le poids des colis,

la déclaration de leur valeur, si elle est faite par l'expéditeur, conformément à l'article 7,

les documents remis au transporteur pour accompagner la lettre de voiture.

La lettre de voiture sera signée par l'expéditeur qui répondra de l'exactitude des mentions qui y sont contenues.

ARTICLE 5.

Le transporteur est responsable des accidents, pertes, avaries et retards.

Il n'est pas responsable s'il prouve avoir pris les mesures raisonnables pour éviter le dommage; cette preuve est admise même dans le cas où le dommage provient d'un vice propre de l'appareil.

ARTICLE 6.

Le transporteur répond des fautes commises par ses préposés. Toutefois, en cas de faute de navigation, le transporteur ne sera pas responsable s'il fait la preuve prévue à l'article précédent.

ARTICLE 7.

La responsabilité du transporteur est limitée à la somme de dix mille francs par voyageur. Toutefois, par un convention spéciale avec le transporteur, le voyageur pourra fixer une limite de responsabilité plus élevée.

Dans le transport des marchandises, la responsabilité du transporteur est limitée à la somme de deux cents francs par colis, sauf déclaration spéciale de valeur faite par l'expéditeur, auquel cas le transporteur sera tenu de payer la valeur déclarée à moins qu'il ne prouve qu'elle est supérieure à la valeur réelle au point destination.

Les valeurs ci-dessus sont des valeurs or. Elles pourront être converties dans chaque monnaie nationale en chiffres ronds.

ARTICLE 8.

Au cas de décès du voyageur transporté, l'action en responsabilité pourra être exercée par personnes auxquelles cette action appartient d'après la législation nationale du défunt, mais sous réserve de la limitation de responsabilité prévue à l'Article précédent.

ARTICLE 9.

Toute clause tendant à exonérer le transporteur de sa responsabilité ou à établir une limite inférieure à celle qui est fixée dans la présente Convention sera nulle et de nul effet.

ARTICLE 10.

L'action en responsabilité sera portée, au choix du demandeur, soit devant le Tribunal du domicile du défendeur, soit devant celui du lieu de départ ou du lieu de destination, soit devant celui du lieu de l'accident.

La procédure sera réglée par la loi du Tribunal saisi; toutefois aucune formalité particulière ou caution ne peut être exigée du demandeur à raison de sa nationalité.

* * *

MOTION

Après avoir dressé, à titre d'exemple, la liste des questions dont l'étude devrait immédiatement suivre l'examen du problème de la responsabilité du transporteur par aéronefs, la Conférence, considérant l'importance, l'urgence, la complexité et la nature techniquement juridique de ces questions, exprime le vœu que soit, à bref délai, nommé un Comité spécial d'Experts chargé de préparer la continuation des travaux de la Conférence.

Ce comité serait composé d'un nombre restreint de membres. Son siège normal serait à Paris.

La Conférence prie, en conséquence, le Gouvernement français de bien vouloir se metter en rapport avec les Gouvernements invités à cette Conférence pour examiner la suite à donner à cette recommandation.

La Conférence émet le vœu que les premières questions étudiées par ce Comité soient:

Dommages causés par les aéronefs aux biens et aux personnes sur le sol.

Assurance obligatoire.

Établissement de registres aéronautiques: propriété de l'aéronef, droits réels, hypothèque.

Saisie.

Location d'aéronef.

Abordage aérien.

Condition juridique du commandant de l'aéronef.

Lettre de voiture.

Règles uniformes pour la détermination de la nationalité de l'aéronef.

EN FOI DE QUOI, les Délégués soussignés ont arrêté le présent Protocole final, dont une copie, certifiée conforme, sera remise à chacun des Gouvernements respectifs.

Fait à Paris, en un seul exemplaire, le 6 novembre 1925.

COMITÉ INTERNATIONAL TECHNIQUE D'EXPERTS JURIDIQUES AÉRIENS

COMPTE-RENDU

DE LA 2E SESSION

Avril 1927

M. COGLIOLO (Italie) formule une critique contre le paragraphe 2 de l'article 3, ainsi rédigé:

"L'absence, l'irrégularité ou la perte de ce titre, ne préjudicie ni à l'existence, ni à la validité du contrat de transport".

On conçoit que la perte de la lettre de transport aérien ne préjudicie pas à l'existence du contrat de transport car il en est de même pour la perte d'une lettre de change. Mais, en ce qui concerne l'absence ou l'irrégularité de la lettre de transport, M. COGLIOLO doute, pour une raison de forme et pour une raison de fond, de l'utilité de l'article qui déclare que cela ne préjudicie pas à l'existence ou à la validité du contrat. La raison de forme est que c'est diminuer singuliérement la valeur de la lettre de transport aérien que de dire, dans un article qui règle toute la question, que son absence ne préjudicie ni à l'existence, ni à la validité du contrat de transport. La raison de fond est qu'il est nécessaire de résoudre la question, très fréquente en droit maritime en ce qui concerne le connaissement. M. COGLIOLO se demande s'il ne serait pas préférable de dire que le transporteur a le droit de le demander à l'expéditeur l'établissement de la lettre de transport aérien et que l'expéditeur a le droit de demander également, mais que, pour les transportes internationaux, une lettre de transport aérien est obligatoire.

M. DE VOS, Rapporteur, expose que l'observation de M. COGLIOLO est précisément un des points qui ont soulevé le plus de difficultés lors de l'examen par la Commission. Il a paru impossible à certaines délégations, et notammant à la Délégation Britannique, d'introduire l'obligation de la lettre de transport aérien pour tous les transports. Cette Délégation estime trés difficile de faire accepter par la législation britannique l'établissement d'une sanction pénale adéquate correspondant à cette obligation. Les experts britanniques ont fait observer qu'en n'imposant pas le principe de l'obligation le résultat pratique serait néanmoins le même. Pour eux, il serait possible d'arriver au même résultat de la manière suivante:

I° - les transporteurs doivent être poussés à se servir d'une lettre de transport aérien chaque fois qu'ils font un contrat de

transport international sans toutefois qu'il soit rendu illégal de s'en dispenser,

2° - si le transporteur se sert d'une lettre de transport, ce document doit (sans qu'il soit toutefois illégal de les omettre) contenir certaines mentions essentielles (mentions numérotées de a) à g) à l'article 7 du projet de convention),

3° - la méthode à adopter pour atteindre ces deux buts devrait être de rendre matériellement avantageux aux transporteurs de faire usage d'une lettre de transport aérien contenant les mentions essentielles et de les mettre dans une situation moins favorable s'ils préférent conclure un contrat de transport sans lettre de transport ou sans les mentions essentielles.

En conséquence, la Délégation Brittannique a proposé à la Commission:

a) que la convention stipule que si un contrat de transport est conclu, sans l'établissement d'une lettre de transport aérien contenant les mentions essentielles, le transporteur perdra les avantages qui lui sont conférés par les articles 5, 6 et 7 de l'avant-projet de Convention sur la responsabilité (sans toutefois porter atteinte aux autres dispositions dudit avant-projet) et qu'un tel contrat, en ce qui concerne les matières auxquelles ont trait les articles précités, est régi par le droit commun,

   La sanction sera de cette façon non seulement automatique, uniforme et universelle, mais elle se trouvera dans le cadre même de la Convention.

b) qu'il soit annexé à la Convention un modèle de lettre de transport dont l'usage serait recommandé.

Il a paru à la Commission que cette conception, très différente évidemment des conceptions latines, pouvait être fort utile et qu'en acceptant ce minimum d'obligations, il était possible d'obtenir l'unanimité et de faire adopter la lettre de transport aérien.

D'autre part, si la mention, au second alinéa de l'article 3, du mot "absence" semble indiquer une contradiction et que, dès qu'il s'agit de régler l'existence de la lettre de transport aérien,

on ne devrait pas parler de son absence, il n'y a là qu'une apparence. Le maintien du mot "absence" indique simplement que la lettre de transport n'est pas obligatoire et que le transport reste valable même sans ce document.

M. PITTARD (Suisse) ajoute que si le mot "absence" n'était pas maintenu, le transporteur ne ferait pas de lettre de transport pour échapper à la convention; tandis qu'avec le maintien du mot "absence" le transporteur reste soumis à la Convention et l'on vise ainsi le transport privé d'un individu faisant exceptionnellement un transport contre rémunération.

M. RIPERT (France) rappelle qu'il a été prévu, par la Deuxième Commission, à l'article 16 de l'avant-projet de convention, une sanction très énergique contre celui qui ne fera pas de lettre de transport: cette sanction consiste en ce que les dispositions de la convention s'appliqueront à lui en tant qu'elle lui sont défavorables et qu'il ne pourra réclamer les exonérations contenues dans la Convention.

Le Président propose de réserver le paragraphe 2 de l'article 3 jusqu'à la discussion de l'article 16, dont il vient d'être parlé. Il en est ainsi décidé.

Le Président donne alors lecture de l'article 4, ainsi conçu, faisant remarquer que, dans le texte définitivement adopté, le terme "lettre de voiture" sera remplacé partout par le terme "lettre de transport aérien".

"Tout transporteur a le droit de demander à l'expéditeur l'établissement et la délivrance d'une lettre de voiture; tout expéditeur a le droit de demander au transporteur l'acceptation d'un pareil document."

Personne ne demandant la parole, cet article est mis aux voix et adopté.

Le Président donne lecture de l'article 5, ainsi rédigé:

"La lettre de voiture est établie par l'expéditeur en trois exemplaires et remise avec la marchandise.

Ces trois exemplaires ont la même valeur.

Le premier exemplaire porte la mention "pour le transporteur"; il est signé par l'expéditeur. Le deuxième exemplaire porte la mention "pour le destinataire"; il est signé par l'expéditeur et le transporteur et il accompagne la marchandise. Le troisième exemplaire est signé par le transporteur et remis par lui à l'expéditeur après l'acceptation de la marchandise."

Personne ne demandant la parole, cet article est mis aux voix et adopté.

Le Président passe alors à l'article 5, ainsi rédigé:

"Le transporteur a le driot de demander à l'expéditeur l'établissement d'exemplaires de lettres de voiture différents lorsqu'il y a plusieurs colis.

Il peut aussi faire établir une ou plusieurs copies pour les facilités du service de transport, notamment des exemplaires d'escales, d'aérodromes de départ et d'arrivée. Ces copies porteront l'indication de leur affectation; elles n'ont pas la valeur des trois exemplaires de la lettre de voiture. Ni les exemplaires ni les copies n'ont la valeur d'un connaissement."

M. RIPERT (France) remarque que la dernière phrase du deuxième paragraphe de l'article 6 ne parait pas satisfaisante parce qu'elle constitue une formule négative. L'idée qu'elle veut exprimer a été reproduite de la Convention de Berne. Dans tous les Etats il existe cette conception du connaissement: que celui-ci représente véritablement la marchandise transportée. Celui qui a le connaissement en main devient le possesseur réel de la marchandise. Celle-ci est embarquée sur le navire, sous la garantie du capitaine; elle doit arriver dans un port déterminée, de sorte qu'elle échappe véritablement à l'expéditeur et qu'elle est à la disposition réelle du destinataire. On a pensé qu'une pareille conception ne pouvait pas être introduite dans la navigation aérienne à cause de la rapidité du transport des marchandises et aussi parce que la remise au destinataire n'est pas aussi bien assurée. Il semble que l'on pourrait indiquer, sous une forme positive, que la lettre de transport ne donne pas la possession réelle de la marchandise.

Cette proposition, mise aux voix, n'est pas adoptée.

Le Président demande si quelqu'un à d'autres observations à faire sur l'article 7.

M. LEBINSKI (Pologne) attire l'attention du Comité sur le mot "itinéraire" au paragraphe 6) de l'article 7. Le Comité Juridique de l'Aviation, qui s'est longuement occupé de la terminologie juridique, a accepté au lieu du mot "itinéraire" les mots "route aérienne". Cette appellation pourrait peut-être, le cas échéant, être prise en considération.

Le Président déclare que cette intéressante observation sera retenue au procès-verbal.

M. DOBKEVIEGIUS (Lithuanie) fait remarquer qu'en ce qui concerne le mot "quantité" il ne semble pas qu'il soit compris dans les autres spécifications du paragraphe (i) et il en estime utile la maintien. D'autre part, il se demande ce que l'on entend par le mot "contenanse".

De l'avis de M. PITTARD (Suisse), c'est le mot "contenu" qu'il faudrait employer.

Le Président déclare, avec le consentement du Rapporteur, que le Sous-Comité de Rédaction reverra ce texte comme il vient d'être dit.

Il met aux voix l'ensemble de l'article 7 qui est adopté.

Le Président donne lécture de l'article 8, ainsi conçu:

"La lettre de voiture doit contenir une clause stipulant que le transport est soumis au régime de la responsabilité établie par la Convention Internationale du 6 Novembre 1925, ainsi que les dispositions principales de celle-ci."

A la suite d'un échange de vues auquel prennent part M. RICHTER (Allemagne), M. COGLIOLO (Italie) et le Rapporteur, il est décidé que le texte de l'article 8 sera ainsi rédigé:

"La lettre de voiture doit contenir une clause stipulant que le transport est soumis au régime de la responsabilité établie par la Convention Internationale du . . ."

Le Secrétaire signale au Comité qu'il n'a pas encore nommé son Sous-Comité de Rédaction et qu'il y aurait lieu de procéder,

dès maintenant, à sa désignation s'il désire que ce Sous-Comité se réunisse et présente son texte avant la fin de la session.

"L'expéditeur est responsable envers le transporteur du tous dommages qui pourraient résulter de l'absence, de l'insuffisance ou de l'irrégularité de ces pièces.

"Le transporteur n'est pas tenu d'examiner si les papiers sont exacts ou suffisants."

Aucune observation n'étant faite, cet article mis aux voix est adopté.

Le Président soumet au Comité l'article 16, ainsi rédigé:

"Si une lettre de voiture contenant toutes les mentions indiquées par l'article 7, lettres a) à g), et par l'article 8 n'a pas été délivrée pour un transport international, le transporteur n'en sera pas moins soumis aux règles de la Convention Internationale sur la responsabilité, mais le transporteur n'aura pas le droit de se prévaloir des dispositions de ladite Convention qui l'exenèrent de sa responsabilité ou des fautes de ses préposés ou qui établissent une limitation de responsabilité."

M. YOUPIS (Grèce) estime que la sanction prévue par cet article et qui consiste à priver le transporteur de tous les avantages de la convention se comprend pour une Compagnie puissante, mais que pour un particulier faisant accidentellement un transport international de marchandises l'absence de limitation de la responsabilité serait, à son avis, une sanction trop sévère.

M. PITTARD (Suisse) ne partage pas cet avis. La limitation de la responsabilité a été envisagée pour amener à la conclusion d'une assurance, si un transportateur accidental de marchandises vont s'aceurer, il n'a qu à limiter sa responsabilité au moyen d'une lettre de transport. Il y a là une barrière trés utile obligeant les transporteurs à rentrer dans le cadre de la convention.

M. PINEDA DE MONT (Guatémala) appuie cette manière de voir.

Le Comité, consulté par le Président, décide d'adopter le texte de l'article 16 tel qu'il a été présenté.

Le Président signale au Comité qu'il y a lieu de reprendre le paragraphe 2 de l'article 3 qui avait été réservé:

"L'absence, l'irrégularité ou la porte de ce titre, ne préjudicie ni à l'existence, ni à la validité du contrat de transport."

Le Président rappelle que le Comité est en présence de deux propositions:

* * *

ENCLOSURE (A) TO DESPATCH N°

COMITÉ INTERNATIONAL TECHNIQUE D'EXPERTS JURIDIQUES AÉRIENS

COMPTE RENDU PROVISOIRE

DE LA 3E SESSION

Mai 1928

CHAPITRE II

Titres de transport. — Section I. — Billet de passage

ARTICLE 3.
Paragraphe premier.

"Dans le transport de voyageurs, le transporteur est tenu de délivrer un billet de passage qui doit contenir les mentions suivantes:

a) le lieu et la date de l'émission,

b) les points de départ et de destination,

c) l'indication sommaire de la voie à suivre (*via*), ainsi que les points d'arrêts prévus,

d) le nom et l'adresse du ou des transporteurs."

Le Rapporteur rappelle que l'I.A.T.A. a formulé certaines observations au sujet de cet article 3:

La première observation demande la suppression sur le billet de passage des points d'arrêts prévus.

Le Rapporteur donne lecture des arguments donnés à ce sujet par l'I.A.T.A.:

"Il ne convient pas que le billet de passage contienne aussi les points d'arrêts prévus. Il y a aujourd'hui déjà des communications aériennes journalières entre deux endroits avec arrêts prévus et sans arrêts prévus. Nous renvoyons à ce sujet à la ligne aérienne régulière de la Deutsche Luft Hansa, entre Berlin et Zurich, qui se pratique chaque jour en partie avec arrêts à Halle, Leipzig, Erfurt et Stuttgart, en partie sans arrêt. Le trafic aérien doit tâcher d'organiser d'une façon égale, alternativement, des communications directes et des communications avec arrêts. Quoique le billet de passage indique régulièrement une heure fixe, il arrive cependant fréquemment qu'il y soit apporté des changements. Etant donné que plusieurs stations sont très surchargées, il ne peut être garanti, qu'en cas de pareils changements, les arrêts tels qu'ils sont indiqués sur le plan soient ajoutés ou biffés.

D'après les termes de l'article premier, il importe seulement de marquer sur le billet de passage, les points d'arrêts indiqués sur le plan qui sont situés dans un pays, dans lequel ne se trouvent pas en même temps le point de départ et le point d'arrivé. Par conséquent, si maintenant des arrêts prévus doivent être mentionnés dans le billet de passage, cela ne peut concerner que les derniers points d'arrêts.

En faisant cette proposition, nous voudrions qu'on considère que les sociétés de trafic aérien ne disposent pas dans les stations respectives d'un personnel aussi nombreux que, par exemple, les chemins de fer et les compagnies de navigation. C'est pourquoi, il est nécessaire que le personnel soit déchargé de tout travail d'écriture qui n'est pas absolument indispensable. Cela importe principalement, si de la délivrance défectueuse d'un billet de passage, il peut résulter pour la société de trafic aérien quelque préjudice."

L'I.A.T.A. a formulé une seconde proposition: l'addition du numéro du bulletin de bagage sur le billet de passage.

La première de ces propositions: suppression de la lettre *c*) a déjà été étudiée antérieurement par les Experts qui l'ont discutée et rejetée, le Rapporteur ne la retient donc pas. La seconde proposition résulte de la pratique et paraît intéressante: l'article 4 prévoyant le numéro du billet de passage, il serait possible de prévoir que le numéro du bulletin de bagage serait porté sur le billet de passage. Toutefois, au point de vue de la convention, cette proposition ne présente pas d'intérêt juridique, elle ne présente d'utilité que pour le transporteur, aussi mettra-t-il cette mention sur le billet que cela soit dit dans la Convention ou non.

Le Président demande au Comité s'il entend retenir cette suggestion qui ne semble pas avoir sa place dans le texte de la Convention.

Aucune autre observation n'étant faite sur le paragraphe premier, et la suggestion de l'I.A.T.A. n'étant pas retenue, le paragraphe premier de l'article 3 mis aux voix est adopté.

Paragraphe 2

"Le billet de passage doit contenir, en outre, une clause stipulant que le transport est soumis au régime de la responsabilité établi par la présente Convention."

M. PITTARD rappelle qu'il a été entendu que des modèles des billets seraient annexés à la Convention ainsi qu'il en a été fait pour la Convention de Berne relative aux chemins de fer. Ces modèles doivent comporter le minimum d'indications, les Compagnies étant libres d'ajouter toutes celles qui leur paraissent utiles.

Le Rapporteur indique que la chose est formellement prévue à l'article 19.

Le paragraphe 2 est alors mis aux voix et adopté.

Paragraphe 3

"L'absence, l'irrégularité ou la perte de ce titre de transport ne préjudicie ni à l'existence ni à la validité du contrat de transport."

Aucune observation n'étant présentée, le paragraphe 3 est adopté.

Paragraphe 4

"Si, pour un transport international, le transporteur accepte le voyageur sans qu'il ait été établi un billet de passage contenant les mentions indiquées ci-dessus, le contrat de transport n'en sera pas moins soumis aux règles de la présente Convention, mais le transporteur n'aura pas le droit de se prévaloir des dispositions de cette Convention qui excluent en tout ou en partie sa responsabilité directe ou dérivée des fautes de ses préposés."

M. YOUPIS croit devoir signaler que la sanction prévue dans ce paragraphe est trop sévère lorsqu'il s'agit d'une simple omission. Il est dit, en effet, "sans qu'il ait été établi un billet de passage contenant les mentions indiquées ci-dessus. . ." L'absence de l'indication du lieu d'émission ou de la date par exemple, retirera au transporteur le droit de se prévaloir des

dispositions qui l'exonèrent de la responsabilité. Il demande que l'on ajoute, à la fin de l'alinéa 4, la phrase suivante: "Si ce billet de passage ne contient pas l'une des mentions indiquées ci-dessus, le transporteur n'aura ce droit que dans la mesure où aucun dommage n'aura été causé aux voyageurs".

M. PITTARD estime que la Convention doit se défendre elle-même. Cette question a été étudiée à fond. S'il y a omission d'une des mentions exigées il y a faute professionnelle et il est nécessaire qu'elle entraîne une sanction.

Le Rapporteur ajoute, qu'ainsi que vient de l'indiquer M. PITTARD, de longues discussions antérieures ont abouti au texte actuellement proposé; la seule sanction pratique qui a été trouvée est celle qui dérive de la convention même. Ces omissions que M. YOUPIS considère comme légères ne le sont pas en fait: Tout ce qui est indiqué comme mentions obligatoires ayant une grande importance. Il rappelle que M. le Professeur COGLIOLO a dit, antérieurement à ce sujet:

"Un service de transports publics doit toujours avoir ses papiers en règle et on doit être plus sévère pour lui que pour un simple oubli d'un voyageur."

M. YOUPIS persiste à trouver que le texte actuel est trop sévère et qu'il pourrait être atténué dans le sens indiqué par lui lorsque personne n'a été lésé.

Le Rapporteur maintient le texte de la Commission Il rappelle que cette disposition, qui a été souvent attaquée au cours des discussions précédentes a toujours été maintenue pour la raison suivante: il s'agit là de la disposition essentielle de la Convention Ce texte représente, en effet, une transaction entre les diverses opinions des Délégations des Gouvernements au C.I.T.E.J.A.: certains délégués demandaient que le titre fut obligatoire, d'autres réclamaient une sanction civile, d'autres encore, une sanction pénale. Le texte finalement adopté est d'inspiration britannique, il constitue une transaction acceptée par tous les membres de la Commission. Si ce texte tombe, il est à craindre que ce soit toute la Convention qu'il faille remettre en discussion.

M. YOUPIS maintient son amendement auquel il donne la forme définitive suivante: "Si le billet de passage ne contient pas l'une quelconque des mentions indiquées ci-dessus, le tran-

sporteur n'aura ce droit que si et dans la mesure où un dommage est causé de ce fait au voyageur."

L'amendement, mis aux voix, n'est pas adopté.

Le Président met aux voix le paragraphe 4, tel qu'il est rédigé. Le paragraphe 4 est adopté.

L'article 3, dans son ensemble, est alors adopté.

ARTICLE 2

Le Rapporteur signale qu'à l'article 2, il a été repris une modification de rédaction qui avait été admise. Le Sous-Comité de Rédaction a prévu une référence à une disposition annexe qui couvre la réserve formulée par le Gouvernement Britannique. Cette référence figure au bas du texte qui a été distribué.

Le Président estime alors qu'il est inutile de mettre: "Dans le protocole de signature figurera la réserve anglaise suivante . . ." Il suffira de mettre: "Le Gouvernement Brittanique déclare. . . ."

L'article 2, mis aux voix par le Président, est adopté.

ARTICLE 3

Le Rapporteur expose qu'à l'article 3 les mots "points d'arrêt prévus" ont été supprimés pour l'élégance de la phrase et il a été dit simplement "les arrêts prévus" (lettre c). La seconde modification concerne le dernier alinéa qui se lit ainsi:

"Si, pour un transport international, le transporteur accepte le voyageur sans qu'il ait été établi un billet de passage, ou si le billet ne contient pas les mentions indiquées ci-dessus, le contrat n'en est pas moins soumis aux règles de la présente Convention, mais le transporteur n'aura pas le droit de se prévaloir des dispositions de cette Convention qui excluent en tout ou en partie sa responsabilité directe ou dérivée des fautes de ses préposés."

Aucune observation n'étant formulée, l'ensemble de l'article 3, mis aux voix, est adopté.

ARTICLE 4

Le Rapporteur indique qu'à l'article 4, il y a une modification du deuxième alinéa qui devient:

"La livraison des bagages au voyageur se fait valablement au porteur du bulletin."

Aucune observation n'étant présentée, l'alinéa 2, ainsi modifié, est adopté.

L'alinéa suivant doit se lire ainsi:

"Le bulletin de bagages est établi en deux exemplaires, l'un pour le voyageur, l'autre pour le transporteur."

A la lettre *c*), le texte est modifié comme suit: "ainsi que les arrêts prévus".

A la lettre *g*), le Sous-Comité de Rédaction a inséré l'ancien alinéa 2 de l'article 4 primitif.

Les trois alinéas suivants sont les mêmes: il y a une modification au dernier paragraphe. Le texte primitif disait par erreur: "Le transporteur n'en sera pas moins soumis. . . .", il est dit maintenant "le contrat de transport n'en sera pas moins soumis. . . ."

Ces différentes modifications mises aux voix sont adoptées par le Comité l'article 4 est adopté, en conséquence, dans son ensemble.

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CERTIFICATE OF ACCURACY

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On this day personally appeared before me Alvin Robert Blattner who, after being duly sworn, deposes and says:

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1. International Conference On Private Aviation Law (October 27-November 6, 1925)
2. International Technical Committee of Legal Aviation Experts, April, 1927
3. International Technical Committee of Legal Aviation Experts, May, 1928
4. Y.J. Blanc-Dannery, Warsaw Convention (Paris 1933)

That the attached translation is a true and correct English version of such original, to the best of his knowledge and belief.

ALVIN ROBERT BLATTNER

SUBSCRIBED AND SWORN TO BEFORE ME
THIS 2nd DAY OF JUNE, 1988

ALEXANDER A. ALKALAY

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MINISTRY OF FOREIGN AFFAIRS

INTERNATIONAL CONFERENCE

ON

PRIVATE AVIATION LAW

(OCTOBER 27-NOVEMBER 6, 1925)

PARIS

NATIONAL PRINTING OFFICE

1926

PRELIMINARY PROJECT

ARTICLE ONE

This agreement is applicable to any transport by aircraft of passengers of merchandise with or without transshipment, the points of departure and destination being situated in two different States.

However it does not apply to transportation reserved for the Postal Administration, even in a single one of the States concerned.

ARTICLE 2

International transportation shall be ascertained by a passage ticket or an international waybill mentioning the points of arrival and destination and, in need be, the points of transshipment.

This passage ticket shall always be made out by name and cannot be transferred. The waybill can be made out to a designated person, to order or to the bearer.

The waybill shall indicate in particular the nature and the weight of the objects transported, a declaration of their value, if it is made by the shipper, the price and method of determination of the price for transport and the place of payment.

ARTICLE 3

The carrier is liable for losses, damage and delays resulting from his personal faults and from equipment defects.

The regularly delivered administrative certificate establishes a presumption until proof to the contrary that the craft, at the origin, was in good condition of airworthiness.

The carrier also takes responsibility for faults committed by his employees upon arrival and departure, receiving, handling and delivery of the merchandise.

ARTICLE 4

The carrier is not responsible for losses, damage or delays:

1° In the event of force majeure, including air risks;

2° In the event of fault of the passenger or defect inherent in the merchandise;

3° In the event of unintentional faults committed by the pilot or technical crew in the operation of the aircraft and related operations.

ARTICLE 5

Under no conditions will the carrier's responsibility exceed the sum of ten thousand francs per traveler; however, by paying a special insurance premium, the traveler may have himself insured for a given sum against the carrier's risks.

In the transportation of merchandise, the carrier's responsibility may not exceed two hundred francs per parcel or unit, except in case of special declaration of value made by the shipper, who enjoys full discretion in this connection.

The above values are gold based values.

ARTICLE 6

Any clause in the ticket for passage or waybill tending to exonerate the carrier from the responsibility established in this agreement or to establish a limit of responsibility other than that determined by the previous article shall be null and void.

ARTICLE 7

In the event of death of a traveler transported, a suit for liability can be introduced only by the spouse and the heirs in direct line, whether legitimate or natural.

ARTICLE 8

The liability suit shall be brought, at the choice of the plaintiff, before the court of the place of departure or of the place of

arrival, or of the place where the accident occurred, if the aircraft has stopped on the way.

The procedure shall be settled by the law of the court instructed; however, no special formality may be imposed on the applicant by reason of his citizenship.

ARTICLE 9

The removal of merchandise, without protestation, by the consignee shall constitute a presumption that the merchandise has been delivered in good condition and in compliance with the transportation document. However, in the event of concealed damage or delay, the consignee shall have three days to protest.

Any protestation must be made by reservations entered in writing on the document or by another written document.

ARTICLE 10

The liability suit must be brought within one year from the aircraft's arrival at destination or its stop.

The causes of suspension and interruption of the prescription are determined by the law of the court instructed.

ARTICLE 11

The judgments pronounced, in presence of both parties or by default, by the competent judge by virtue of the provisions of this agreement are declared executory in the States which have signed this agreement, without need to review the entire situation.

ARTICLE 12

In the event of transport by successive aircraft with transshipment, the traveler may have recourse only against the carrier who has caused the accident through his fault.

In the same case, the shipper of merchandise may have recourse against "the first carrier and the consignee against"[1] the last, and both may furthermore take action against the carrier who has caused the loss or damage through his fault.

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1 Note by the Secretary General. The words between quotation marks had been omitted in error from the proposed text distributed by the French Government; this omission was pointed out by the French Delegation during the conference.

REPORT

MR PRESIDENT,

GENTLEMEN,

The second Commission has been charged with studying the project submitted by the French Government concerning the liability of the air carrier. Presided by Professor COGLIOLO, it has held four sessions devoted to discussion of the texts; a restricted commission consisting of MM. RIPERT, MEGARRY, ARENDT, SCHREIBER and PITTARD has specified, in one session, the texts adopted by the second Commission.

We take this opportunity to very sincerely thank the authors of the French project; the text submitted to us has greatly facilitated our work and has served as a basis as well as a method for the delicate study of the rules of liability.

The text of the preliminary project submitted to you must be taken up in plenary discussion and the second Commission has no intention of imposing the result of its deliberations. It has formulated the legal provisions which you are at liberty to modify; however it wishes to present some brief comments on the reasons which dictated its preliminary project.

International transport.—This is obviously a form of transport which covers the territory of several countries. But this brings up a first question; is the international character determined by the *fact* or the *intent* of the parties? An aircraft leaving France and bound for Morocco flies over Spain; if it is forced to land in this latter country, does the voyage, by this fact, acquire an international character? An aircraft leaving France for England completes its voyage by landing in France; does the voyage fall within the concept of internal law by the fact that it did not pass from one country to another?

The Commission deems that for the application of an international agreement it was preferable to base oneself not on a possibly accidental or involuntary *fact*, but on the *intent* of the parties, in other words on the character that the parties have freely given to the transportation contract when it was concluded; this is the preoccupation which motivates paragraph 2 of Article 1.

A second question concerns the very nature of the transport. Most legislations allow that in contracts for profit the liability is greater than in not-for-profit contracts. It would therefore seem advisable to make a distinction between paid transportation and free transportation; but on the other hand this distinction does not exclude fraud and it is conceivable that the liability we wish to impose on the carrier may be canceled by more or less open collusion giving the transport a "free" character while the remuneration is stipulated in another form; finally, the carrier may have to transport passengers benefiting from free tickets.

The Commission deemed it wise to apply the same rule to all cases of transportation, whether there is remuneration or not.

The question was raised of friendly or sporting transportation, i.e. the case of a pilot who takes a friend aboard for an unpaid excursion.

This question was resolved by considering that, in this case, there is no transportation contract and in order to properly identify this difference, Article 2 has added the qualifier "commercial".

This does not mean that it is not useful to determine the liability of the carrier with no contract; but the Commission felt that this went beyond its limits and it proposes that the question be readdressed to the first Commission, which will enter it in the general schedule of aerial regulations.

Article 2 therefore embraces all commercial transportation, regardless of the nature of the aircraft, but it excludes postal transportation because this is governed by special agreements between States.

The term "corporation under public law" may appear unusual or constitute a neologism; the Commission submits it for your approval, in the absence of a better term, as including entities which are not private, i.e. the State, the towns, public administrations, etc.

Form of the contract.—Is the transportation contract conventual or formal? The unanimous opinion of the Commission is that the contract is conventual. But there is a great practical importance in specifying the conditions of transportation, in particular for eventual proof.

Thus we assumed that the transportation document provided in Article 3 demonstrates the existence of a contract but does not constitute one.

In practice it is necessary to establish a ticket for passage or a waybill without the omission of such document influencing the existence of the contract. The shipper must also be able to demand a receipt for the merchandise and, in this connection, it appears that the simplest way is to deliver a duplicate of the waybill certified by the carrier's signature or stamp.

These national laws must provide, by means of penal clauses, that these requirements be really sanctioned.

The *transportation document* is only an "instrumentum", but it has an undeniable importance. We therefore felt it necessary to specify its form, so as to facilitate the adoption of a single model by the various air transport agencies.

The statements to be contained in the transportation document are enumerated in Article 4; they are not limiting and it is hardly necessary to justify the need for them. We did not specify the documents which eventually accompany the waybill for, on the one hand, it is up to each State to list them and, on the other hand, to the carrier to refuse merchandise without proper papers. Here we submit only the rule that the waybill must mention, as a simple inventory, whatever documents are attached to it.

As in the case of rail transportation we assumed that the shipper is responsible for the accuracy of the statements entered in the waybill and that this responsibility will be attested by the shipper's signature affixed to the waybill.

Liability by reason of accidents, loss, delay, damage.—This is the main point of our project and we insist on repeating here that the text proposed to you may give rise to ample discussions.

The Commission asked itself which system of liability should be adopted: risk or fault. The general opinion is that, while third party civil liability must include application of the risk theory, on the other hand, in the liability of the carrier with respect to passengers and merchandise, the theory of fault must be adopted.

Having settled this first point, one may wonder on whom falls the burden of proof. It seemed fair not to impose this heavy burden on the injured party and the presumption of fault on the part of the carrier was assumed. But as this is only a presumption, the carrier has evidently the right to bring proof to the contrary and then the limit of the fault must be clearly established: where does it begin?

What can one expect from air transportation? A normal organization of its operation, a judicious choice of personnel, constant supervision of its agents and employees, a serious control of its equipment, accessories and materials used.

It must be assumed that whoever makes use of an aircraft is not unaware of the risks inherent in a mode of travel which has not reached the point of perfection the railways have acquired after one hundred years of operation.

It is therefore fair not to impose absolute responsibility on the carrier and to release him from any liability when he has taken reasonable and normal measures to prevent damage; this is the concern one would expect from a good manager.

In the present state of aeronautics it seems indicated to stop there while at the same time providing, for a somewhat distant future, a possible comparison with the liability of railways.

Still more delicate is the question of the carrier's liability with respect to his employees.

The text submitted to you includes the application of two principles. The first is of general application, namely that the master is responsible for the actions of his employees; the second, already adopted for the carrier's liability, is that there is no responsibility without fault, this fault being presumed until proof of reasonable care is established.

One may wonder whether the carrier's liability is not more extended thereby as concerns the employees than for himself; but this is only in appearance. In fact, in both cases, there is responsibility only if there is fault or, more exactly, if the presumed fault has not been canceled by proof that reasonable care has been taken to prevent the damage; but, as long as this proof is not brought, the presumption of fault remains and the master is responsible for the doings of his employees as well as for his own.

It appeared however necessary to bring a restriction to this responsibility; in any form of transportation one must consider the technical maneuvers which concern the actual operation of the aircraft, and the commercial transactions unrelated to aerial laws (packing, loading, arrival, unloading, storing the merchandise either before shipment, in case of interruption, or upon arrival until delivery).

While for these last operations there is no reason to release the carrier from his responsibility, on the other hand the carrier's responsibility can be eliminated in case of operational errors committed by his employees if he proves that he himself has taken all measures apt to prevent the damage; first of all, the crew must not be allowed to lose the feeling of its own responsibility, then it must be admitted that in its present state air traffic involves certain risks inherent in the very nature of this mode of travel (air risks) and that the shipper must take account of and participate in them.

Limit and exoneration of liability.—Articles 7 to 9 of the preliminary project constitute a whole and must be considered all together.

The Commission adopted the fundamental principle that the exoneration clause should be prohibited, for persons as well as for goods; this was to prevent agreements in which the parties might not be on an equal footing in freely giving their consent.

The shipper could find that transportation is denied him if he did not subscribe to an exoneration clause. On the other hand, account should also be taken of an important economic element, namely that the operator must be able to gauge the extent of the risks he assumes. It is to satisfy this double requirement that the preliminary project prohibit the carrier from eliminating or reducing his liability below a certain value and that, at the same time, it limit the carrier's maximum liability to 10,000 gold francs for persons and 200 gold francs per parcel. Naturally, the parties may increase the value of the passengers' lives and of the merchandise above the limit provided by the preliminary project, this by means of a special clause which can be treated on the one hand like insurance for persons and on the other hand like a declaration of interest upon delivery for merchandise (similar to the Berne Convention for rail transportation).

In this area a special question arose as concerns the action brought by legal claimants in case of death of the passenger. Do these act as heirs or "jure proprio"? There is a need to determine exactly the extent of the rights of the legal claimants for, depending on the national laws, the nature of their rights could lead to an interpretation differing from the legal basis and somehow cancel the limitation set by the preliminary project. Since it is almost impossible to set in a single formula the various legal concepts of the various States, it appeared simpler to specify in Article 8 that the claimants would be determined according to the national law of the deceased, but that the rights of these persons would be limited to the maximum sum allowed by Article 7.

In summary, thanks to this system, air transportation enjoys a protection which it is not permitted to eliminate and the carrier can clearly measure his risks and cover them, which is very important in the determination of transportation rates and hence for the development of air travel.

Competence and jurisdiction.—The general opinion of jurists in matters relating to the air is favorable to the extension of the rules of competence and no objection has been raised to the provisions of Article 8, paragraph 1, of the French draft; the Commission added the normal forum of the defendum ("forum rei").

As concerns the procedure, the wish was expressed that the applicant not be subjected to any particular formality and to no special charge (judicatum solvi security) by reason of his citizenship; this rule was incorporated in Article 10, paragraph 2, of the preliminary project.

Article 11 provides the general rule in the matter of transportation for what concerns the procedure of ascertaining the merchandise; it calls for no special comment.

Article 12 limits the duration of the time for recourse: the French draft established the prescription of one year and this appeared normal; but the diversity in legislations in the matter of interruption and suspension, as also the possible and pre-

sumable distance in the case of air transport, as finally the necessity, as concerns injuries and disability of the victims, to permit a more precise evaluation of the extent of the liability, all these elements led the Commission to increase the duration of the prescription to two years.

It was necessary to anticipate the occurrence of several successive transports in continuous transportation; in this case the liability must be settled differently, depending on whether a person or merchandise is concerned.

The normal principle is that responsibility is incumbent upon the carrier over whose system the damage occurred.

In the case of an accident involving a person, there is no reason not to apply the general rule and the suit must be directed against the carrier responsible for the accident. On the other hand the situation is quite different as concerns merchandise; first of all, it is not always easy to determine when a damage has occurred; secondly, each carrier can verify the apparent condition of the merchandise at the time he takes possession of it; finally, there is a mandate of which the merchandise is the object (which is not the case in the transportation of persons). This mandate creates a collective and solidary liability of the carriers; but in order to avoid any confusion and any abuse, Article 13 provides that the shipper shall address the first carrier, the consignee shall address the last, and either of them may address the carrier over whose system the damage has occurred.

To complete the rules concerning competence, the Commission wrote an Article 14 whose scope is fairly serious; this article prohibits any prorogation of forum and any agreement concerning the applicable law which has taken place at the time the transportation contract was concluded. The reason is easy to grasp: the preliminary project sets limits of liability, discards the clause of exoneration, determines the forum for the action as well as the time limit for prescription. All this forms a whole and would become useless if one of the terms could be modified by a particular agreement. It is therefore necessary to prohibit the prorogation of forum and the choice of applicable law just like the clause of exoneration is prohibited.

Application of the Agreement.—Article 15 provides that the Agreement shall apply in each contracting State to all international transports having their point of origin or destination within a contracting State.

A different opinion has been held, requiring for the application of the Agreement that both States be contracting States; but this opinion has been discarded for the following reasons:

1. The Agreement must be generalized as much as possible and for this it is preferable to extend rather than restrict its field of application.

2. For the reasons stated previously and by which the international character of the transport results from the intention of the parties, it suffices that the point of departure be located within a contracting State.

3. If the point of arrival alone is within a contracting State, it is very advantageous for the carrier as well as the client to know exactly the conditions under which the liability exists and is applied; this makes it possible for each to measure his risks, aside from the common law applicable in the place of arrival, said law being often unknown.

The Commission limited its study to the liability of the air carrier.

During its work it noted some points which appeared important but which fell outside of its competence:

1. This concerns determining the liability of the pilot or owner in cases where transportation does not constitute a contract (friendly or sporting transportation).

2. It also concerns the recommendation to insert in national legislations the guarantees apt to ensure application of Article 3.

3. One should also regulate points relating to air transport but which do not involve air risks at all: warehousing of merchandise, notification of arrival given to the consignee, home delivery, etc.

4. Finally and especially, the Commission expresses the wish that the Governments conclude as quickly as possible an agreement facilitating the execution of judgments rendered abroad.

The preliminary project submitted to you is but a discussion of the principles to be adopted, but if the Conference deems that it must give it the form of an international Convention, the clauses of duration of the Convention, denunciation, ratification, etc., should be added.

Your reporter apologizes for having held your attention for so long. He apologizes with a word of J.J. ROUSSEAU: I did not have the time to be more brief.

Paris, November 2, 1925

E. PITTARD
Reporter

EMBASSY OF THE
UNITED STATES OF AMERICA

Paris, January 12, 1926.

The Honorable
The Secretary of State,
Washington.

Sir:

With reference to the Department's telegraphic instruction No. 386 of October 22nd last, I have the honor to enclose herewith a copy of Major Yount's report regarding the "Conférence internationale de Droit privé aérien."

I am also enclosing a draft of an agreement with regard to this subject, which is the translation of the most important part of a document published by the Ministry for Foreign Affairs entitled "Conférence internationale de Droit privé aérien." This document is being forwarded under separate cover.

I have the honor to be, Sir,

Your obedient servant,

/s/ MYRON T. HERRICK
Myron T. Herrick

Enclosures and accompaniment:
As stated above.

In triplicate.

SCHEME OF AGREEMENT

. . . . . .

likewise desirous of finding a solution for the important question regarding responsibility of the conveying party in international transports by aerial machines, they have decided to enter into an Agreement and as a consequence have appointed their plenipotentiaries, to wit:

. . . . . .

who having become acquainted with their full powers, found in good and due form, have agreed to the following provisions:

ARTICLE 1.

For the purpose of the present Agreement, the term "international transport" refers to all transport in which, according to stipulations of the parties, the places of departure and arrival are situated in two different countries or States, whether there has been a transfer to another machine, interruption in conveyance or not.

ARTICLE 2.

The present Agreement applies to international transports by aerial machines of a commercial character, carried out with or without remuneration from the State and legal persons connected with public right.

Postal transports carried out under the control of international postal conventions do not come within the sphere of the present Agreement.

ARTICLE 3.

International transport shall be established by a travel-ticket or way-bill.

Upon request of the forwarding party, the carrier shall be bound to deliver him a duplicate of the way-bill duly certified.

Lack, irregularity or loss of the transport certificate does not cause prejudice to either the existence or validity of the transport contract.

ARTICLE 4.

The travel-ticket and way-bill shall mention in particular:

The places of departure and arrival.
The route followed.
The name and address of carrier.
Cost of transport, date and place of payment.
Indication of the legal limit of responsibility and, should the case arise, of the supplementary guarantee of the carrier, according to Article 7.
Place and date of issue.

Furthermore, the way-bill shall mention, in particular:

The name and address of the forwarding party and the consignee.
The length of time for transport, if it is stipulated.
Nature of the merchandise and style of packing.
Number and weight of packets, marks and figures indicated thereon.
Declaration of their value, if same is made by the forwarding party, in accordance with article 7.
Documents handed to the carrier to go with the way-bill.

The way-bill shall be signed by the forwarding party who shall be held responsible for the correction of the indications contained therein.

ARTICLE 5.

The conveying party is responsible for accidents, losses, damages and delays.

He is not responsible if he proves that he has taken reasonable steps to avoid damage; this proof is even admitted in the case when damage arises through a defect in the machine itself.

ARTICLE 6.

The conveying party is answerable for errors committed by his officials. Nevertheless, in case of faulty navigation, the conveying party shall not be held responsible if he provides proof as mentioned in the foregoing article.

ARTICLE 7.

Responsibility of the conveying party is limited to the sum of ten thousand francs per passenger. Nevertheless, upon special agreement with the conveying party, the passenger shall be able to fix a higher limit of responsibility.

In the conveyance of merchandise, the conveying party's responsibility is limited to the sum of 200 francs per package unless a special declaration of value has been made by the forwarding party, in which case the carrier shall be held liable for the value declared unless he is able to prove it greater than the real value at the place of arrival.

The foregoing values are gold values. They may be converted into every national currency in round figures.

ARTICLE 8.

In case of decease of a passenger carried, the law-suit regarding responsibility may be taken by the persons who have a right to take such action according to the law of the land of the deceased person but under the reserve of the limitation of responsibility provided for in the foregoing article.

ARTICLE 9.

Every clause which tends to exonerate the conveying party from his responsibility or to fix a limit lower than the one laid down in the present Agreement shall be null and void.

ARTICLE 10.

The law-suit regarding responsibility shall be taken, at the applicant's choice, either before the Tribunal sitting in the place where the defendant lives or before that at the place of departure or arrival or again before that at the place the accident occurred.

The procedure shall be governed by the law of the Tribunal to which application is made; nevertheless, no particular formality or guarantee shall be required of the applicant on account of his nationality.

MOTION.

After having drawn up, as an example, the list of questions, study of which should immediately follow examination of the problem regarding responsibility of the conveying party, by aerial machine, the Conference, considering the importance, urgency, complexity and technically judicial nature of these questions, expresses the wish that a special Committee of Experts be appointed as soon as possible, on which shall devolve the task of preparing the continuation of the work of the Conference.

This Committee shall be composed of a restricted number of members. Its regular headquarters shall be in Paris.

The Conference, therefore, prays the French Government to be good enough to get into touch with the Governments invited to this Conference to examine the decision to be given with regard to this recommendation.

The Conference expresses the wish that the first questions studied by this Committee be:

Damage caused by the aerial machines to property and persons on the ground.
Compulsory insurance.
Establishment of aeronautical registers: ownership of the aerial machine, real rights, mortgage.
Seizure.
Hiring of aerial machine.
Collisions in the air.
Legal status of the Commander of the aerial machine.
Way-bill.
Uniform regulations for determination of the nationality of the aerial machine.

IN FAITH OF WHICH the undersigned Delegates have drawn up the Present Protocol, certified true copy of which shall be remitted to each of the respective Governments.

Made in Paris in a single copy, November 6th, 1925.

INTERNATIONAL TECHNICAL COMMITTEE
OF LEGAL AVIATION EXPERTS

REPORT

ON THE 2ND SESSION

April 1927

Mr. COGLIOLO (Italy) formulates a criticism against paragraph 2 of Article 3, which is worded as follows:

"The absence, irregularity or loss of this document does not affect the existence nor the validity of the transportation contract".

It can be conceived that the loss of the air waybill does not affect the existence of the transportation contract, for the same holds true for the loss of a bill of exchange. But, as concerns the absence or irregularity of the letter of transportation, Mr. COGLIOLO, for a reason of form and for a reason of substance, doubts the utility of the article which states that this does not affect the existence or validity of the contract. The reason of form is that to say, in an article which settles the entire question, that its absence does not affect the existence nor the validity of the transportation contract is to singularly diminish the value of the letter of air transport. The reason of substance is that it is necessary to resolve the question, very frequent in maritime law as concerns the waybill. Mr. COGLIOLO wonders whether it would not be preferable to say that the carrier has the right to request the shipper to prepare the letter of air transport and that the shipper has also the right to request it but that, for international transports, an air waybill is mandatory.

Mr. DE VOS, Reporter, states that Mr. COGLIOLO's remark is precisely one of the points which raised the greatest difficulty during the Commission's examination. It appeared impossible for certain delegations, and particularly the British delegation, to introduce the obligation of the air waybill for all transports. This delegation considers it very difficult to have the British delegation accept the establishment of an adequate penal sanction corresponding to this obligation. The British experts pointed out that by not imposing the principle of obligation the practical result would nevertheless be the same. For them, it would be possible to arrive at the same result in the following manner:

1. The carriers must be urged to make use of an air waybill whenever they conclude an international transportation contract without, however, it being made illegal to do without one;

2. If the carrier makes use of a waybill, this document must contain (without however it being illegal to omit them) certain essential statements (statements numbered a) to g) in Article 7 of the draft Agreement);

3. The method to be adopted in order to achieve these two goals should be to make it materially advantageous for the carriers to make use of an air waybill containing the essential statements and to place them in a less favorable situation if they prefer to conclude a transportation contract without waybill or without the essential statements.

As a result, the British delegation proposed to the Commission:

a) that the agreement stipulate that if a transportation contract is concluded without the establishment of an air waybill containing the essential statements, the carrier shall lose the advantages conferred upon him by Articles 5, 6 and 7 of the preliminary project for the Agreement on liability (without however affecting the other provisions of said preliminary project) and that such contract, as concerns the topics to which the forementioned articles refer, is governed by common law;

   In this manner the sanction will be not only automatic, uniform and universal, but it will appear within the very framework of the Agreement.

b) that a model transportation document whose use would be recommended be attached to the Agreement.

It appeared to the Commission that this concept, obviously very different from Latin concepts, could be quite useful and that by accepting this minimum of obligations it was possible to achieve unanimity and to have the air waybill adopted.

On the other hand, if mention in the second paragraph of Article 3 of the word "absence" seems to indicate a contradiction and if, since it is a question of settling the existence of the air waybill, one should not speak of its absence, this is only an appearance. Retaining the word "absence" indicates simply that

the waybill is not mandatory and that the transportation remains in effect even without this document.

Mr. PITTARD (Switzerland) adds that if the word "absence" were not retained, the carrier would not issue a waybill in order to evade the Agreement; while, by retaining the word "absence", the carrier remains bound by the Agreement and thus this would cover the private transportation of an individual being transported exceptionally against remuneration.

Mr. RIPERT (France) points out that, in Article 16 of the draft Agreement, the Second Commission had provided a very severe sanction against whoever does not issue a waybill: this sanction consists in that the provisions of the Agreement apply to him in that they are unfavorable to him and that he will not be able to claim the exonerations contained in the Agreement.

The President proposes holding paragraph 2 of Article 3 until discussion of Article 16, just mentioned. It was decided accordingly.

The President then reads out Article 4, conceived as follows, pointing out that in the text finally adopted the term "waybill" will be replaced everywhere by the term "letter of air transportation".

"Any carrier has the right to request the shipper to prepare and deliver a waybill; any shipper has the right to request the carrier to accept such document."

Since no one asks to speak, this article is submitted to voice vote and adopted.

The President reads out Article 5, worded as follows:

"The waybill is prepared by the shipper in three copies and delivered together with the merchandise.

"These three copies have the same value.

"The first copy bears the mention "for the carrier"; it is signed by the shipper. The second copy bears the mention "for the consignee"; it is signed by the shipper and the carrier and it accompanies the merchandise. The third copy is signed by the carrier and delivered by him to the shipper after acceptance of the merchandise."

Since no one asks to speak, this article is submitted to voice vote and adopted.

The President then goes on to Article 6, worded as follows:

"The carrier has the right to request the shipper to prepare different copies of the waybill when there are several parcels.

"He can also have one or more copies prepared for the convenience of the transportation service, namely copies of stopovers, airports of origin and destination. These copies shall bear indication of their distribution; they do not have the value of the three copies of the waybill. Neither the originals nor the copies have the value of a waybill."

Mr. RIPERT (France) observes that the last sentence of the second paragraph of Article 6 does not appear to be satisfactory because it constitutes a negative formula. The idea it wants to express has been reproduced from the Berne Convention. In all the States there exists this concept of the waybill: that it actually represents the merchandise transported. Whoever holds the waybill in hand becomes the real owner of the merchandise. The merchandise is embarked on the ship, under the guarantee of the captain; it must arrive in a given port, so that it is actually lost to the shipper and really becomes available to the consignee. It was thought that such a concept could not be introduced in air transport because of the rapidity of transport of the merchandise and also because delivery to the consignee is not as well assured. It seems one should be able to indicate, in a positive form, that the letter of transport does not confer true ownership of the merchandise.

This proposal, submitted to voice vote, is not adopted.

The President asks whether anyone has other comments to make on Article 7.

Mr. LEBINSKI (Poland) calls the Committee's attention to the word "itinerary" in paragraph 6 of Article 7. The Legal Committee on Aviation, which has devoted much time to the legal terminology, agreed to the words "air route" instead of the word "itinerary". This designation could perhaps be taken in consideration, if need be.

The President declares that this interesting remark will be retained in the minutes.

Mr. DOBKEVIEGIUS (Lithuania) points out that, as concerns the word "quantity", it does not appear to be included in the other specifications of paragraph i) and he deems that it should be. On the other hand he wonders what is meant by the word "contenance" (capacity).

In Mr. PITTARD's (Switzerland) opinion the word "contenu" (contents) should have been used.

The President declares, with the consent of the Reporter, that the Editing Sub-Committee will revise the text as just mentioned.

He submits the entire Article 7 to voice vote; it is adopted.

The President reads out Article 8, worded as follows:

"The waybill must contain a clause stipulating that transportation is subject to the liability system established by the International Convention of November 6, 1925, as well as to its principal provisions."

Following an exchange of views between Mr. RICHTER (Germany), Mr. COGLIOLO (Italy) and the Reporter, it is decided that the text of Article 8 shall be worded as follows:

"The waybill must contain a clause stipulating that transportation is subject to the liability system established by the International Convention of . . . . . ."

The Secretary points out to the Committee that it has not yet appointed an Editing Sub-Committee and that it would be advisable to name one, as of now, if it is desired that this Sub-Committee meet and submit its text before the end of the session.

"The shipper is responsible with respect to the carrier for all damages which might result from the absence, inadequacy or irregularity of these documents.

"The carrier is not required to examine whether the papers are exact or adequate."

As no comment is made, this article is put to voice vote and adopted.

The President submits to the Committee Article 16, worded as follows:

"If a waybill containing all the statements indicated in Article 7, letters a) to g), and in Article 8 has not been delivered for an international transport, the carrier is no less subject to the rules of the International Convention on liability, but the carrier shall not be entitled to avail himself of the provisions of said convention which exonerate him of his liability or faults committed by his employees or which establish a limitation of liability."

Mr. YOUPIS (Greece) deems that the sanction provided by this article and which consists in depriving the carrier of all the benefits of the agreement is understandable for a powerful Company, but that for an individual performing an occasional international transport of merchandise, the absence of limitation of liability would, in his opinions, constitute an excessively severe sanction.

Mr. PITTARD (Switzerland) does not share this view. The limitation of liability has been considered in order to lead to the conclusion of an insurance; if an occasional carrier of merchandise wishes to become insured, he only has to limit his liability by means of a letter of transportation. Here is a very useful barrier forcing the carriers to fall within the framework of the agreement.

Mr. PINEDA DE MONT (Guatemala) supports this point of view.

The Committee, consulted by the President, decides to adopt the text of Article 16 as submitted.

The President points out to the Committee that paragraph 2 of Article 3, which had been held up, should now be reviewed:

"The absence, irregularity or loss of this document does not affect the existence nor the validity of the transportation contract."

The President points out that the Committee is in presence of two proposals:

ENCLOSURE (A) TO DESPATCH N°

INTERNATIONAL TECHNICAL COMMITTEE OF LEGAL AVIATION EXPERTS

PROVISIONAL REPORT

ON THE 3d SESSION

May 1928

CHAPTER II

Transport Documents—Section I—Tickets for Passage

ARTICLE 3

First paragraph

"In the transportation of passengers, the carrier is required to deliver a ticket for passage which must contain the following statements:

a) the place and date of issue;
b) the points of departure and destination;
c) the summary indication of the route to be followed (via) as well as the scheduled stopovers;
d) the name and address of the carrier(s)."

The Reporter states that the I.A.T.A. has formulated certain comments concerning this Article 3:

The first comment requests the elimination, in the ticket for passage, of the scheduled stopovers.

The Reporter reads out the arguments given by the I.A.T.A. on this subject:

"It is not suitable that the ticket for passage should also contain the scheduled stopovers. Nowadays there are already daily flights between two places with and without scheduled stopovers. On this subject we refer to the regular airline Deutsche Luft Hansa, between Berlin and Zurich, which flies every day in part with stopovers at Halle, Leipzig, Erfurt and Stuttgart, and in part without stopovers. Air traffic must attempt to organize in equal fashion, and in alternation, direct communications and communications with stopovers. Although the ticket for passage regularly indicates a fixed hour, it however frequently happens that changes are made. Since many stations are quite overloaded it cannot be guaranteed that, in the event of such changes, stopovers as indicated in the schedule will not be added or crossed out.

"According to the terms of Article First, it matters only to mark on the ticket for passage the stopovers indicated in the

schedule, which are located in a country in which the point of departure and the point of arrival do not appear at the same time. As a result, if now scheduled stopovers must be mentioned in the ticket for passage, this can concern only the last stopping points.

"By submitting this proposal we would like that consideration be given to the fact that airlines do not maintain in their respective stations as much personnel as, for example, railroads and shipping companies. This is why it is necessary that the personnel be relieved of any but the most essential paper work. This is particularly important if some prejudice can result for the airline from the incorrect delivery of a ticket for passage."

The I.A.T.A. has formulated a second proposal: the addition of the baggage check number to the ticket for passage.

The first of these proposals: elimination of letter c), has already been studied previously by the Experts, who have discussed and rejected it; therefore the Reporter takes no account of it. The second proposal results from practice and appears interesting: as Article 4 provides for the number of the ticket for passage, it would be possible to expect that the number of the baggage check would be entered in the ticket for passage. However, from the point of view of the convention, this proposal has no legal interest and it is useful only for the carrier; thus he will enter this statement in the ticket, whether the Agreement says so or not.

The President asks the Committee whether it intends to adopt this suggestion which does not appear to have a place in the text of the Agreement.

As no other remark is made regarding the first paragraph, and since the I.A.T.A. suggestion is not adopted, the first paragraph of Article 3 put to voice vote is adopted.

Paragraph 2

"The ticket for passage must furthermore contain a clause stipulating that transportation is subject to the system of liability established by this Agreement".

Mr. PITTARD points out that it was understood the model tickets would be attached to the Agreement, as was done for the

Berne Convention on railroads. These models must include the minimum of indications, the Companies being free to add all the ones they deem useful.

The Reporter indicates that this is formally provided in Article 19.

Paragraph 2 is then put to voice vote and adopted.

Paragraph 3

"The absence, irregularity or loss of this transport document does not affect the existence nor the validity of the transportation contract."

No remark having been made, Paragraph 3 is adopted.

Paragraph 4

"If, for an international transport, the carrier accepts the traveler without a ticket for passage containing the above statements having been prepared, the transportation contract will nonetheless be subject to the rules of this Agreement, but the carrier shall not have the right to avail himself of the provisions of this Agreement which exclude all or part of his liability, whether direct or derived from the fault of his employees."

Mr. YOUPIS feels compelled to point out that the sanction provided in this paragraph is too severe in the case of a simple omission. It is said, in fact, "without a ticket for passage containing the above statements having been established . . .". The absence of indication of the place of issue or of the date, for example, will deprive the carrier of the right to avail himself of the provisions exonerating him of liability. He asks that the following sentence be added at the end of paragraph 4: "If this ticket for passage does not contain one of the statements indicated above, the carrier shall have this right only to the extent that no damage has been caused to the passengers".

Mr. PITTARD feels that the Convention must defend itself. This question has been studied thoroughly. If there is omission of one of the required statements, then there is a professional fault and it must involve a sanction.

The Reporter adds that, as just indicated by Mr. PITTARD, long prior discussions have led to the text now being proposed; the only practical sanction which has been found is the one deriving from the Agreement itself. These omissions which Mr. YOUPIS considers as slight are not so in fact: All that are indicated as mandatory statements are highly important. He points out that Prof. COGLIOLO had previously said on this subject:

"A public transportation service must always have its papers in order and it must be dealt with more severely than for the simple oversight committed by a passenger."

Mr. YOUPIS insists on finding that the present text is too severe and that it could be attentuated in the sense indicated by him when no one has been injured.

The Reporter retains the Commission's text. He points out that this provision, which has often been attacked during previous discussions, has always been maintained for the following reason: this concerns the essential provision of the Agreement. This text in fact represents a compromise between the various opinions of the Government Delegates to the C.I.T.E.J.A.: certain delegates asked that the document be made mandatory, others called for a civil sanction, yet others, a penal sanction. The text finally adopted is British inspired; it constitutes a compromise accepted by all members of the Commission. If this text fails, it is to be feared that the entire Agreement will have to be renegotiated.

Mr. YOUPIS maintains his amendment, to which he gives the following final form: "If the ticket for passage does not contain any one of the statements indicated above, the carrier shall have this right only if and to the extent that a damage is caused thereby to the passenger."

The amendment, submitted to voice vote, is not adopted.

The President puts paragraph 4, as it is worded, to a voice vote. Paragraph 4 is adopted.

Article 3 is then adopted in its entirety.

ARTICLE 2

The Reporter points out that in Article 2 there is a modification in wording which had been accepted. The Editing Sub-Committee has provided a reference to a related provision which covers the reservation formulated by the British Government. This reference appears at the bottom of the text which was distributed.

The President then deems that there is no need to say: "In the protocol for signature will appear the following British reservation . . .". It will suffice to say: "The British Government declares . . ."

Article 2, put to voice vote by the President, is adopted.

ARTICLE 3

The Reporter says that in Article 3 the words "scheduled stopping points" have been eliminated for the sake of style; the text reads simply "the scheduled stops" (letter c). The second modification concerns the last indent which reads as follows:

"If, for an international transport, the carrier accepts a traveler without a ticket for passage having been established, or if the ticket does not contain the statements indicated above, the contract is nonetheless subject to the rules of this Agreement, but the carrier shall not have the right to avail himself of the provisions of this Agreement which exclude all or part of his liability, whether direct or derived from faults committed by his employees."

No comment being made, the entire Article 3 is put to voice vote and adopted.

ARTICLE 4

The Reporter indicates that in Article 4 there is a modification in the second paragraph which becomes:

"Delivery of baggage to the traveler is validly done to the bearer of the [baggage] check."

No comment being made, paragraph 2, thus modified, is adopted.

The following paragraph must be read as follows:

"The baggage check is made out in two copies, one for the traveler, the other for the carrier."

Under letter c), the text is modified as follows: "as well as the scheduled stops".

Under letter g), the Editing Sub-Committee inserted the former paragraph 2 of the original Article 4.

The following three paragraphs are the same: there is a modification in the last paragraph. The original text said in error: "The carrier shall nonetheless be subject . . ."; it now reads: "The transportation contract shall nonetheless be subject . . ."

These different modifications put to voice vote are adopted by the Committee. Article 4 is therefore adopted in its entirety.

* * * * *

Excerpts from "Second International Conference on Private Aeronautical Law Minutes, Warsaw, 1929" (R. Horner & D. Legrez trans. 1975)

SEVENTH SESSION

October 10th, Evening

The session is open at 6:45 p.m., Mr. Lutostanski presiding.

We pass to Article 3 which is the first of the following chapter. It is thus conceived:

CHAPTER II—DOCUMENTS OF CARRIAGE

SECTION I—PASSENGER TICKET

Article 3

1) In the carriage of travelers, the carrier shall be required to deliver a passenger ticket which must contain the following particulars: (a) the place and date of issue; (b) the points of departure and of destination; (c) the contemplated stopping places, provided that the carrier may reserve the right to modify the stopping places in the case of necessity, and without this modification having the effect of depriving the carriage of its international character; (d) the name and address of the carrier or carriers; (e) the indication that the carriage is subject to the system of liability set forth by the present Convention.

2) The absence, irregularity or loss of the passenger ticket shall not affect either the existence or the validity of the contract of carriage, but shall nonetheless be subject to the rules of the present Convention. Nevertheless, if the carrier accepts the traveler without having delivered a passenger ticket, he shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability.

MR. YOUPIS (Greece): In the first paragraph of this article, it is said: "the indication that the carriage is subject to the system of liability set forth by the present Convention".

This particular appears as well in Article 8, as regards the waybill; but in Article 4, paragraph 2, letter (h) it is said: ". . . to the system of the present Convention".

I believe that one should take a uniform formula.

MR. GIANNINI, President of the Committee: As I warned you, as we proceed in examining each article, we will eliminate the minor errors which may have slipped in. We have tried to use uniform language, but if something escaped us, I would be obliged to you to note it. Naturally, the formula must be the same throughout.

THE PRESIDENT: No one asks the floor? . . . I put Article 3 to a vote.

(Adopted).

REPORT

presented in the name of the
International Technical Committee
of Aeronautical Legal Experts
by Mr. Henri De Vos, Reporter,

on the Preliminary Draft of a Convention
relating to documents of air carriage and
to the liability of the carrier in
international carriage by aircraft.

The International Technical Committee of Aeronautical Legal Experts, during the course of its meeting in Madrid in May, 1928, definitively rendered the Preliminary Draft of a Convention annexed hereto whose object is: certain rules relating to documents of air carriage–passenger ticket, baggage check, an air waybill, as well as relating to the liability of the air carrier and to the limitation of this liability.

This draft is the end result of numerous preparatory studies which have been expressed in eight previous texts concerning either the liability of the carrier or the waybill.

A first preliminary draft of a Convention fixing the bases of the liability of the carrier and of the limitation of this liability as regards air carriage had been presented by the French Government at an international conference, which was held in Paris on October 26, 1925.

This conference set up a committee which reshaped this text. The conference was presented on November 3, 1925 with the Preliminary Draft thus amended. New modifications thereto were made by the conference on November 6, 1925.

Moreover, a first preliminary draft on the waybill was presented to the Second Committee of the CITEJA (set up in the meantime) which met in Paris on March 30, 1927.

Following the examination of this draft by the CITEJA in April, 1927, this text was slightly amended.

The CITEJA, having decided during the course of this same meeting to examine the possibility of joining in a single convention, the two matters—liability and documents of carriage—a new preliminary draft was presented in June, 1927.

This text was modified during deliberations of the Second Committee of the CITEJA which met in Brussels from November 7 to 10, 1927.

A new meeting of this committee took place in Paris on March 21 and 22, 1928, during the course of which the previous texts were amended.

Finally, they came back before the CITEJA which put them definitively in order at Madrid in May, 1928.

* * *

Before examining the articles of the preliminary draft, it is important to bring out that in this matter an international agreement can only be reached if it is limited to certain determined problems. The text applies, therefore, only to the contract of carriage in its formal appearances first of all, and in the legal relationships which arise between the carrier and the persons carried or the people who ship. It regulates no other question that transport operations could give rise to.

All the same, the Convention does not set up a system of compulsory insurance.

All the same again, the limitation of liability being fixed from the point of view of the carrier, the question of abandonment is not raised.

As it's a question of liability engaged at the time of a specific contract of carriage, the Convention, of course, only applies to damage caused by the equipment assigned to *this* carriage for the execution of the contract.

It was important to give these first limiting indications regarding the matter forming the object of the Convention before examining the limits of the scope of application which it contains in its first Article.

The draft appears, in effect, as follows:

–A Chapter I sets forth the object of the Convention and the precise limits of its application.

-A Chapter II contains in four sections the essential rules concerning the documents of carriage: passenger ticket, baggage check and air waybill.

-A Chapter III includes provisions relating to the liability of the carrier and to the limitation of this liability.

-A Chapter IV includes two general provisions.

CHAPTER II—DOCUMENTS OF CARRIAGE

SECTION 1—PASSENGER TICKET

A special document is provided for carriage of passengers. This document is necessarily different from those used for carriage of baggage and the circulation of goods.

This baggage ticket must contain only a minimum of particulars.

Moreover, the sanction provided for for carriage of passengers without a ticket or with a ticket not conforming to the Convention is identical to that provided for, for carriage of baggage and goods.

This sanction formula constitutes a compromise between the different opinions of the governmental delegations to the CITEJA of which some asked that the document of carriage be compulsory certain of them with civil sanctions and others with penal sanctions, and others defended the principle of freedom of contract.

SECTION II—BAGGAGE CHECK

The same observation as for passengers applies to baggage. A special article concerned the baggage check.

It is provided that the carrier can validly deliver baggage to the bearer of the check.

But this check does not constitute a bearer instrument; the carrier can, if he has doubts on the subject of its ownership, refuse delivery, without proof, of the baggage. The traveler can moreover, demand, in the case of loss of his check, the production of the second copy in order to prove he is the owner. Finally, the liability of the carrier for baggage is a common

law liability, and the proof of fault falls upon the owner of the baggage.

SECTION III—AIR WAYBILL

The air waybill witnesses the international carriage of goods; it is but an instrument of proof.

The Convention does not impose the obligation of having a waybill; but, as soon as one exists, the provisions of the Convention apply to it.

As it is said above, this formula is a compromise for the purpose of arriving at an unanimous adoption of rules of the Convention, certain members being of the opinion that carriage should be witnessed compulsorily by an air waybill, other deeming that in this matter it is better to leave the parties free to safeguard their interest.

The guarantee for the protection of these interests is found in the right recognized in the carrier to demand from the consignor the making out and the delivery of an air waybill, and in the right recognized in the consignor to demand from the carrier the acceptance of such a document, this acceptance leading, besides, to the obligation of the carrier to hand over to the consignor the waybill signed by him.

The waybill is made out in three copies which have the same value, and are destined to the three persons directly interested in the carriage; the consignor, the carrier and the consignee.

The particulars appearing on the waybill must be given by the consignor, who alone can supply them and guarantee their accuracy. In fact, it will not always be the consignor who will make the material entries on the document: It will often be the agent of the carrier himself, but, in this case, this agent will act on behalf of the consignor.

The particulars indicating that a document covering international carriage is involved, that is to say, those provided for under letters (a) through (f), are indispensable from the point of view of the performance of the Convention.

It is the same for the particulars found at letter (g): the nature of the goods, because prohibitions can be decreed by different countries regarding the entry or exit of goods.

The other particulars from (h) to (p) present an undeniable usefulness, but their omission cannot be, according to certain national ideas, validly sanctioned. It is highly recommended that the waybill bear these particulars, but their insertion will depend above all on the interest itself which the parties have in indicating them on the document constituting the document of carriage.

These particulars, besides, are not exclusive. It can be useful, for example, in certain cases, to give an indication of the aircraft which will transport the goods.

The waybill must not, however, be confused with the aircraft log book, which will be able to usefully provide information on changes of destination, transshipments, operations performed en route, thus facilitating the solution of litigation on the subject of non-delivery of goods, of their return to the consignor, etc., but the regulation of which finds no place in the present Convention.

Moreover, to provide for the case of combined carriage, it has been provided that the document of carriage could contain clauses relating to other modes of carriage, provided that the provisions of the Convention be respected as to the air leg.

The consignor is liable for the accuracy of the indications and declarations concerning the goods. He must suffer the consequences of any irregularity or inaccuracy in this regard.

One of the original texts provided a special measure for intentional false declarations of a nature of the goods. In this case, the carrier would not have been liable for the loss or damage. This measure was, however, limited by the possibility for the consignor to prove that his false declaration was not of a nature so as to cause the carrier any damage whatsoever.

This provision was eliminated: Coming from common law, it seemed too severe for the consignor, the sanction of the first paragraph of Article 16 being sufficient, anyway, but it is understood that the consignor answers for all consequences of his declarations.

The contract of carriage is concluded at the time when the carrier accepts the goods: if they are accepted without a waybill, the contract will nonetheless be valid. These principles of com-

mon law, which appeared in the first article, were not retained, because they are self-evident.

The waybill is *prima facie* evidence of the conclusion of the contract, of the receipt of the goods and the conditions of carriage.

The carrier has the right to verify the declarations relating to the quantity, the volume, and the condition of the goods. It's only when he has verified these declarations that they constitute proof against him. A contradictory and precise verification is, however, useless regarding the particulars relating to weight, dimension, number and packing, as well as to the apparent condition of the goods; even without this verification, the carrier is deemed to have recognized the accuracy of these declarations, since he can ascertain errors immediately, point them out, or make his reservations.

The consignor has the right to dispose of the goods before they have arrived at the destination and before the waybill has been delivered to the consignee. If the carrier complies with the orders of the consignor without requiring the copy of the waybill delivered to the latter, he will be, according to the provisions of the Bern Convention on the carriage of goods by railroad, liable for the damage which could be caused by this fact to all interested parties.

The Convention provides no express provision relating to waybills "to order" or "to the bearer". The present texts do not exclude the possibility of recognizing such documents. Thus, at Article 18, was put "the name and the address of the consignee, if necessary". Eventually, in the case of carriage "to the bearer", the name and address of the consignee would be omitted; but no provision concerning the system to be applied in this case was provided for, because the question is neither theoretically or practically ripe.

The carrier is required to deliver the waybill to the consignee at the place of destination and to deliver the goods to him.

To this obligation corresponds the consignee's right to receive the document destined for him and to have the goods delivered.

He will be able to pursue his right in the case where the goods do not arrive at their destination and, in accordance with Article 16 of the Bern Convention, he will consequently be able to act at the expiration of a period of seven days after the goods should have arrived.

On the subject of this period, it is better to point out that, when in the Convention it is a question of days, ordinary days and not working days are involved.

The right to receive the document and the goods leads necessarily to the obligation of paying the amount of the debts which result from the conditions and the charges for the carriage indicated in the waybill, and notably the amount of the indicated price of the goods if the shipment is made C.O.D.

As to rights of disposal and delivery of the goods, Articles 12, 13, 14 and 15 add specifications to prior texts on the subject of the conditions to the exercise of these rights.

It was stipulated, notably, that the right of the consignor ends at the moment where that of the consignee begins, but if the consignee refuses the waybill or the goods, the consignor resumes his right of disposal; that the carrier must notify the consignee of the arrival of the goods within a period of twenty-four hours; that the consignor and the consignee can pursue all the rights recognized in them, whether they act in their own interest or in the interest of others, that these articles do not prejudice either the relations between the consignor and the consignee, or the relations of third parties whose rights arise either from the carrier or from the consignee.

The right to deviate from the provisions of these articles is recognized, but any clause which deviates therefrom must be inserted in the waybill.

As to sanctions, it has already been pointed out that the difficulty for certain national ideas to provide adequate measures for the purpose of insuring the observance of certain provisions of the Convention led to the adoption of a system which appears eminently practical and which consists in the eventual loss

of the advantages which are conferred upon the parties by certain articles of the draft on the liability of the carrier.

The parties have, therefore, great interest in using a waybill containing the essential particulars.

However, it seemed opportune to remind one at the end of the Convention that all these provisions left entirely intact the right of all carriers to refuse to accept any carriage whatsoever.

B.

PROPOSALS OF THE DELEGATIONS

GREEK REPUBLIC

Article 3—Section 4

Conforming to Article 22 of the draft, in the case of an accident, the carrier can escape his liability if he proves that he and his servants have taken reasonable measures to avoid the damage, or that it was impossible for them to take them.

However, according to Article 3, the carrier loses this advantage if the passenger ticket does not contain the particulars indicated in this article.

It is possible, in effect, that by simple negligence the carrier has omitted to mention in the passenger ticket the place of issuance, or the point of departure, or his name and address; or even that he keeps his former address in the ticket, or finally he does not point out an intermediate stop.

These are, in general, omissions without great importance for the party, because it is known or easy to establish that the ticket was issued and the departure took place from the aerodrome of such and such a city, that the aircraft is owned by such company, or because the intermediate stop can be without interest for the contracting party.

One can wonder why such an omission, without importance for the majority of cases, should lead to such a serious sanction in every case as that provided for by Article 3, paragraph 4.

If the omission is without interest for the other party, and if it causes him no damage, how could one justify this severe sanction on the shoulders of the carrier?

This sanction is justified only in the case where the omission of a particular would have engendered damage to the passenger, as it can happen in certain circumstances.

But who will judge if there is damage to the other contractant because of this omission and if the damage is such that the carrier must be made to lose the option of escaping by proof that he has done what is necessary to avoid the accident? Naturally

there is only the court, seized with the affair who would be able to judge this question.

It's for these reasons that we propose to modify paragraph 4 of Article 3 of the draft as follows:

"If, for international carriage, the carrier accepts a traveler without having made out a passenger ticket, the contract of carriage shall nonetheless be subject to the rules of the present Convention, but the carrier shall not have the right to avail himself of the provisions of this Convention which exclude in all or in part his direct liability or that derived from the errors of his servants.

"If the passenger ticket does not contain one of the particulars hereabove, the carrier shall be deprived of this right in the case where, according to the judgment of the court, damage would be caused to the other party by this fact."

For the same reasons one should modify in the same sense paragraph 7 of Article 4 for the baggage check and Article 17 for the waybill.

JAPAN

Articles 3 and 4

It's not clear from the text, in particular from Article 4, if the particular of the clause concerning the liability of the carrier is compulsory, as it is provided for in Article 17 for goods. The Japanese Delegation thinks that this particular should be compulsory.

Article 4

It would be advisable as well to insert always particular (g) relating to delivery of baggage.

A-94

YVONNE-J. BLANC-DANNERY

Licenciée ès-Lettres
Docteur en Droit

LA CONVENTION DE VARSOVIE ET LES RÈGLES DU TRANSPORT AÉRIEN INTERNATIONAL

PARIS
A. PEDONE, ÉDITEUR
LIBRAIRIE DE LA COUR D'APPEL ET DE L'ORDRE DES AVOCATS
13, Rue Soufflot, 13

1933

SECTION I

Le billet de passage

Le billet de passage (3) est le titre constatant que le prix du transport a été versé par le voyageur. Suivant l'usage répandu dans les compagnies aériennes, il est établi en seul exemplaire détaché d'un carnet à souches. Comme il est appelé, le cas échéant, à apporter la preuve des conditions du transport, il doit contenir un certain nombre d'indications, savoir:

a) Le lieu et la date de l'émmision;

b) Les points de départ et de destination;

c) Les arrêts prévus, sous réserve de la faculté, pour le transporteur, de stipuler qu'il pourra les modifier en cas de nécessité et sans que cette modification puisse faire perdre au transport son caractère international;

d) Le nom et l'adresse du ou des transporteurs;

e) L'indication que le transport est soumis au régime de responsabilité établi par la présente Convention.

Ces mentions ont été intentionnellement réduites au minimum, afin de simplifier les formalités à remplir et de faciliter l'administration des transports aériens. "Les compagnies aériennes ne disposant pas dans les stations respectives d'un personnel aussi nombreux que les compagnies de chemin de fer ou maritimes, il est nécessaire que le personnel soit déchargé de tout travail d'écritures qui n'est pas absolument indispensable" (4). De son côté, le passager trouve sur son billet les précisions relatives à l'exercise éventuel de l'action en responsabilité et il est suffisamment renseigné sur les conditions du voyage qu'il entreprend. Il n'eut donc pas été adroit de s'appesantir sur des points de détail. C'est pourquoi, les propositions d'insérer le prix du transport, les noms, adresse, nationalité des voya-

(3) Loi du 31 mai 1924, art. 46: "Le contrat de transport des passagers doit être constaté par la délivrance d'un billet."

(4) Argument de l'I.A.T.A. pour demander le retrait de la mention des arrêts prévus.

geurs furent écartées. L'exigence des arrêts prévus et l'indication de la voie à suivre ont été atténuées par la possibilité pour le transporteur: "de stipuler qu'il pourra les modifier en cas de nécessité". L'Association Internationale du Trafic Aérien (I.A.T.A.) avait beaucoup insisté sur la difficulté de les garantir. Comme il est cependant utile qu'un certain itinéraire soit fixé, l'adoption de cette réserve était le moyen terme cherché.

Les délégués se sont demandé si le billet de passage serait cessible ou non. Il était malaisé de lui conférer un caractère aussi absolu, car l'un et l'autre ont des avantages et des inconvénients. Comment, en effet, empêcher le voyageur d'envoyer une tierce personne louer sa place? Ce qui ne serait pas possible avec un titre de transport nominatif. D'autre part, il y a grand intérêt à connaître les noms et adresses des passagers. C'est en quelque sorte leur assurer la propriété du billet. Le projet d'ajouter dans un alinéa 4 une mention portant que "sur la demande, soit du transporteur, soit du voyageur, le billet pourrait être nominatif et porter le nom et l'adresse du voyageur" fut repoussé.

Les parties demeurent donc libres de stipuler l'incessibilité. En pratique, les difficultés s'aplaniront, car les compagnies prennent généralement soin de faire signer les billets au moment de la délivrance. De plus, les listes réglementaires de bord (5) qui doivent forcément contenir les indications se rapportant à chaque passager seront, à l'occasion, utilement consultées. En tous cas, les mentions du billet de passage ne sont pas limitées, les contractants pourront toujours les compléter par d'autres, s'ils le jugent nécessaire.

Sanction

Le jeu de la sanction est très simple. L'article 3 ne fait aucune distinction entre les mentions: "le transporteur est tenu de délivrer un billet de passage qui doit contenir les mentions suivantes". Autrement dit, toutes sont obligatoires. Faute par lui d'accepter un voyageur sans qu'il ait été établi de titre de

(5) Loi française du 31 mai 1921, article 46: "Il est dressé une liste nominative des passagers embarqués dont le duplicata doit se trouver à bord de l'aéronef et être communiqué sur leur demande aux autorités chargées de la police de la circulation."

transport ou si celui-ci est irrégulier—c'est-à-dire s'il ne porte pas les mentions requises—le transporteur est le seul puni: "Il perd le droit de se prévaloir des dispositions qui excluent ou qui limitent sa responsabilité." Comme le billet de passage n'est qu'un instrument de preuve, le contrat par lui-même n'est aucunement affecté de son absence, de son irrégularité ou de sa perte. Il n'en demeure pas moins valable et soumis aux règles de la présente convention.

Le transporteur ne doit donc pas manquer de se conformer à ces prescriptions.

DOCTRINE

SECTION I

The Passage Ticket

The passage ticket (3) is the document ascertaining that the price of the voyage has been paid by the traveler. According to usage common among airlines, it is made out in a single copy detached from a stub booklet. Since it may eventually have to serve as proof of the conditions for transportation, it must contain a certain number of indications, namely:

a) The place and date of issue;

b) The points of origin and destination;

c) The scheduled stops, subject to the carrier's option to stipulate that he may modify them, if necessary, without this modification altering the international character of the transport;

d) The name and address of the carrier(s);

e) Indication that the transport is subject to the system of responsibility established by this Convention.

These statements have intentionally been reduced to a minimum in order to simplify the formalities to be accomplished and to facilitate the administration of aerial transportation. "Since airlines do not maintain in the respective stations as large a staff as railways or shipping lines, it is necessary that the personnel be relieved of any paper work which is not absolutely essential" (4). On his part, the traveler finds in his ticket details on the eventual exercise of the action in liability and he is sufficiently informed on the conditions of the trip he is undertaking. Therefore it would not have been desirable to insist on points of detail. This is why the suggestions of inserting the price of the passage, the names, address and nationality of the travelers were rejected. The requirements concerning scheduled stops and indication of the itinerary were attenuated by the possibility for the carrier: "to stipulate that he may modify them if necessary". The International Association of Air Traffic (I.A.T.A.) had greatly insisted on the difficulty of guaranteeing them.

However, as it is useful that a certain itinerary be established, adoption of this reservation was the compromise sought.

The delegates wondered whether or not the passage ticket would be transferable. It is rather difficult to give it such an absolute character, for one or the other has both advantages and disadvantages. In fact, how could one prevent a traveler from having a third party book his place? This would not be possible with a travel document made out by name. On the other hand, it is quite advantageous to know the names and addresses of the passengers. This, in some way, guarantees them ownership of the ticket. The proposal to add in a paragraph 4 a mention that "upon request by either the carrier or the passenger, the ticket could be made out by name and bear the name and address of the traveler" was rejected.

The parties therefore remain free to stipulate non-transferability. In practice the difficulties will be smoothed, for airlines will generally take care to have the tickets signed at the time of delivery. Moreover, the mandatory manifests (5) which must contain the indications pertaining to each passenger can always be consulted, if necessary. In any event, the indications in the passage ticket are not limited; the contracting parties may always complete them if they deem it necessary.

Sanction

Application of the sanction is very simple. Article 3 makes no distinction whatever between the statements: "The carrier is required to issue a travel ticket which must contain the following indications". In other words, all are mandatory. Should he refuse to accept a traveler without a transportation document having been prepared or if same is irregular—i.e. if it does not contain the required statements—the carrier alone is punished: "He loses the right to claim the provisions which exclude or limit his liability." As the passage ticket is only an instrument of proof, the contract itself is in no way affected by its absence, irregularity or loss. It is no less valid and subject to the regulations of this Convention.

The carrier must therefore not fail to comply with these instructions.

* * *

THE NATIONAL LAW JOURNAL

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Air Crash Death Average: $362,943

BY ANDREW BLUM
National Law Journal Staff Reporter

THE AIRLINE industry paid an average of $362,943 for each person killed in major plane crashes between 1970 and 1984, according to a Rand Corp. study obtained by The National Law Journal.

And that figure has been rising dramatically in the 1980s, according to an NLJ examination of the figures included in the study for this decade and of more recent crash award trends.

The Rand study, still in its drafting stages, is said to be the most comprehensive look ever at the amount of money paid out as a result of air-crash disasters. It was financed in part by the Aerospace Industries Association of America (AIA), which was a proponent of a no-fault compensation system at the time it was commissioned, but which has—for now—changed its mind.

Information about the study's contents comes at a time when unprecedented scrutiny is being given to two of its topics: airline safety and the civil litigation system. And one of its conclusions is that there was little relationship between pay-outs and safety expenditures in the time period studied.

The report looks at 2,228 passenger and ground deaths in 25 major crashes. Among its findings:

Airline Fatalities Cost $1 Billion in 14 Years

Dramatic Rise

Further investigation by the NLJ based on the Rand research shows the average amount rose to about $500,000 for victims in crashes after 1980. But many attorneys point out that wrongful-

death compensation appears to have risen drastically in crashes in the last five years, a fact that will make the Rand study almost outdated upon its completion.

The study—made with the cooperation of plaintiffs, defendants and insurers—was financed by Rand and a $400,000 grant from AIA.

25 Accidents in the Study

Date	Airline	Location	Deaths	Injuries
11/4/70	Southern	Kenova, W.Va.	70	0
11/27/70	Capitol	Anchorage, Alaska	46	85
6/6/71	Air West	Duarte, Calif.	44	0
9/4/71	Alaska	Juneau, Alaska	104	0
12/8/72	United	Chicago	42	19
12/20/72	North Central	Chicago	10	13
12/29/72	Eastern	Miami	95	65
7/23/73	Pan Am	Tahiti	68	1
7/31/73	Delta	Boston	83	0
12/17/73	Pan Am	Rome	28	24
1/31/74	Pan Am	Pago Pago	87	4
4/22/74	Pan Am	Bali	96	0
9/8/74	TWA	Ionian Sea	79	0
9/11/74	Eastern	Charlotte, N.C.	70	8
12/1/74	TWA	Mt. Weather, Va.	85	0
6/24/75	Eastern	New York	107	9
4/27/76	American	St. Thomas	36	53
3/27/77	Pan Am	Tenerife	324[1]	56
4/4/77	Southern	New Hope, Ga.	70	25
9/25/78	PSA	San Diego	135	9
12/28/78	United	Portland, Ore.	7	173
5/25/79	American	Chicago	261	7
10/31/79	Western	Mexico City	61	18
1/13/82	Air Florida	Washington, D.C.	74	8
7/9/82	Pan Am	New Orleans	146	5
		Total	**2,228**	**582**

(1) Does not include 235 KLM passenger deaths.

Supreme Court, U.S.
FILED
JUN 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1055

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ELISA CHAN, et al.,

Petitioners,

vs.

KOREAN AIR LINES, LTD.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED DECEMBER 23, 1987
CERTIORARI GRANTED APRIL 4, 1988

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Transcript of February 28, 1985 Hearing, *In Re: Korean Air Lines Disaster of September 1, 1983*, MDL 565 (D.D.C. 1985)	J.A.327
Certification for Appeal under 28 U.S.C. § 1292(b), dated September 23, 1985 (D.D.C. 1985).....	J.A.366
Order of the Court of Appeals for the District of Columbia Circuit dated April 8, 1986.....	J.A.367

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Order of the Court of Appeals for the District of Columbia Circuit dated January 30, 1987, Remanding the Record for Clarification..... J.A.370

Memorandum Opinion of the United States District Court dated May 7, 1987 and reported at 664 F.Supp. 1488 (D.D.C. 1987)..... J.A.372

Opinion of the Court of Appeals for the District of Columbia Circuit dated September 25, 1987, adopting the Memorandum and Order of the United States District Court dated July 25, 1985, and reported at 829 F.2d 1171 (D.C. Cir. 1987) and 664 F.Supp. 1463 (D.D.C. 1985)..... J.A.376

Judgment of the Court of Appeals for the District of Columbia Circuit dated September 25, 1987 ..... J.A.442

Order of the Court of Appeals for the District of Columbia Circuit dated November 16, 1987 ..... J.A.444

Chronological List of Relevant Docket Entries

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Multidistrict Litigation Docket No. 565

IN RE: KOREAN AIR LINES DISASTER OF SEPTEMBER 1, 1983

DATE	FILINGS—PROCEEDINGS
11/17/83	CERTIFIED copy of OPINION and ORDER from Judicial Panel on Multidistrict Litigation transferring thirty-two (34) pending actions to the District of the District of Columbia, assigned to Honorable Chief Judge Aubrey E. Robinson, Jr. for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. 1407; Schedule A.
	* * *
2/17/84	MOTION by pltfs' for partial summary judgment against Korean Air Lines; Statement of Material Facts; Appendix A and B; Affidavit in Support; Memorandum; Table of Authorities; Exhibits 1 thru 7.
3/23/84	STATEMENT of Points and Authorities of Korean Air Lines Co., Ltd. in opposition to plaintiffs' motions for partial summary judgment; table of contents; exhibits A thru N; Rule 56(f) Affidavit; Statement of genuine issues; affidavit of Abraham L. Meilen, exhibit A.
4/6/84	NOTICE of Filing amendment to Plaintiffs' Steering Committee's motion for partial summary judgment.
4/6/84	REPLY by pltfs Steering Committee to the opposition of Korean Air Lines to pltfs motions for partial summary judgment; Table of Authorities; Exhibits A thru D.

4/13/84 MOTION of deft Korean Air Lines Co., Ltd. for leave to file a Sur-Reply statement of points and authorities in opposition to plaintiffs' motion for partial summary judgment and request for expedited treatment; Stipulation; Statement of points and authorities.

4/18/84 ORDER filed 4/18/84 that deft. KOREAN AIRLINES CO., LTD., may serve and file a Sur-Reply Statement of points and authorities in opposition to pltfs' motions for Partial Summary Judgment by May 4, 1984. Robinson, C.J.

4/19/84 RESPONSE by Pltfs Steering Committee's statement in response to deft Korean Air Lines motion for leave to file a Sur-Reply Brief.

5/4/84 SUR-REPLY statement of points and authorities of deft KAL in opposition to pltfs' motion for partial summary judgment.

2/28/85 MOTION of pltf (against KAL only) for Partial Summary Judgment heard, argued and taken under advisement. Robinson, C.J.

3/12/85 POST argument supplemental statement of P&A's by deft KAL in opposition to pltfs' motion for partial summary judgment, exhibits A thru C.

4/1/85 TRANSCRIPT of proceedings on 2/28/85, pp 1-63. Robinson, C.J.

7/25/85 MEMORANDUM AND ORDER that pltfs' motion for partial summary judgment against deft Korean Air Lines Co., Ltd. is denied; and it is, further ordered, that Korean Air Lines Co., Ltd. is entitled to avail itself of the limitation on damages provided by the Warsaw Convention and raised to $75,000 by the Montreal Agreement; and it is, further ordered, that pltfs may not receive immediate payment of $75,000, there being material issues of fact with respect to the amount of unliquidated damages. (See for further details) Robinson, C.J.

8/2/85 AMENDED ORDER to amend the Court's order of July 25, 1985, and the reasons stated therein, it is by the Court this 1st day of August, 1985, Ordered, that the claims in the above-captioned complaints against Korean Air Lines are dismissed. Robinson, C.J.

8/29/85 NOTICE of pltfs of motion to amend court's memorandum and order to certify appeal of defective ticket issue; memorandum in support. (filed 8-23-85).

9/12/85 REPLY of pltfs to deft Korean Air Lines opposition to pltf's motion to certify appeal of defective ticket issue.

9/24/85 CERTIFICATION FOR APPEAL under 28 U.S.C. section 1292(b) that the issue disposed of by this Court's Memorandum and Order of July 25, 1985, which held that Korean Air Lines is entitled to avail itself of the limitation of damages provided by the Warsaw Convention and Montreal Agreement despite its defective tickets, involve controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. Robinson, C.J.

9/24/85 ORDER that the July 25, 1985 Memorandum and order of this Court is hereby amended to add that the part of the Memorandum and Order which denies the pltfs' motion for partial summary judgment against Korean Air Lines on the defective ticket issue and holds that Korean Air Lines is entitled to avail itself of the limitation of damages provided by the Warsaw Convention and Montreal Agreement involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may

materially advance the ultimate termination of the litigation. Robinson, C.J.

4/09/86 ORDER (copy) filed 4-8-86 in USCA granting Plaintiffs' Steering Committee leave to appeal pursuant to 28 U.S.C. 1292(b).

4/09/86 ORDER (copy) filed 4-8-86 in USCA directing Clerk, USDC, upon payment of docketing fee, to transmit preliminary record to USCA in No. 85-5982.

2/03/87 ORDER (copy of) filed 1-30-87 in USCA remanding record for clarification. (Record returned to file room).

2/27/87 SUPPLEMENTAL memorandum of points and authorities by Korean Air Lines Co., Ltd. pursuant to order remanding record for clarification.

3/27/87 MEMORANDUM by pltfs.' Steering Committee in response to KAL memorandum regarding order remanding record for clarification.

5/8/87 MEMORANDUM. Robinson, C.J.

5/8/87 ORDER filed 5/7/87 directing that memorandum and order of 7/25/87 shall apply to these actions.

5/11/87 ORDER continued: ACTIONS: 83-3448, 83-3450, 83-3454, 83-3457, 83-3458, 83-3459, 83-3463, 83-3465, 83-3466, 83-3469, 83-3470, 83-3473, 83-3792, 83-3890, 83-3898, 83-3902, 83-3903, 84-0029.

* * *

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Docket No. 85-5982

IN RE: KOREAN AIR LINES DISASTER OF SEPTEMBER 1, 1983

DATE	FILINGS—PROCEEDINGS
(B) 10-02-85	4-Appellant's petition for permission to appeal pursuant to 28 U.S.C. § 1292 (b) (p-26)
(B) 10-02-85	Docketing statement was mailed to counsel for appellant
(G) 10-15-85	4-Appellee's opposition to petition for permission to appeal pursuant to 1292(b) (m-14) [#23]
(G) 10-22-85	4-Appellant's reply to opposition to petition for permission to appeal pursuant to 1292(b) (m-22) [#23]
(G) 03-24-86	4-Petitioners' motion to expedite determination of leave to appeal pursuant to 28 U.S.C. § 1292(b)
(E) 04-08-86	Per curiam order that the motion to expedite determination of the petition for leave to appeal is granted. The petition to leave to appeal pursuant to 28 U.S.C. 1292(b) is granted. The district court has properly found that the requirements of 28 U.S.C. 1292(b) are satisfied, and wise exercise of our discretion dictates that the appeal be allowed. The following briefing schedule shall apply: Appellants' brief and record excerpts—May 7, 1986; Appellee's brief—June 6, 1986; and Appellants' reply brief, if any—June 23, 1986. The Clerk is directed to transmit a certified copy of this order to the district court pursuant to Fed.R.App.P. 5. Scalia and Buckley (who did not participate in this order), CJs, and McGowan, SCJ.
(E) 04-09-86	Certified copy of above order transmitted to the District Court.

(E) 04-08-86 Clerk's order that the Clerk of the District Court, upon payment of the docketing fee, shall certify and transmit to this Court a preliminary record in this case.

(R) 04-11-86 Notice from Clerk, DC re: Court of Appeals docketing fee was paid of April 10, 1986 [15]

(T) 04-21-86 Orders entered 4/8/86 addressed to George Tompkins, Jr. returned "Attempted Not Known" —resent to NY office on 4/21/86.

(E) 05-07-86 15-APPELLANTS' BRIEF (p-7) [BIN NO. 17-5]

(E) 05-07-86 7-JOINT APPENDIX VOLS. I-III (p-7)

(R) 06-09-86 15-APPELLEE'S BRIEF

(R) 06-26-86 4-Appellant's motion for leave to file reply brief after filing deadline (m-26) [13]

(E) 07-11-86 Clerk's order granting appellant's motion to extend briefing time, and the briefing schedule is revised as follows: Appellant's reply brief—July 11, 1986. (The Clerk is directed to file appellant's lodged reply brief.)

(E) 07-11-86 15-APPELLANT'S REPLY BRIEF (m-26)

(J) 01-07-87 CERTIFIED ORIGINAL RECORD—13 volumes; 7 transcripts under 2 separate covers; and 4 exhibits in brown folders

(J) 01-08-87 Clerk's order, *sua sponte*, that the following times are allotted for oral argument: Appellant—20 minutes; Appellee—20 minutes. The panel considering this case will now consist of Circuit Judges Ruth B. Ginsburg, Williams and D.H. Ginsburg

(J) 01-20-87 ARGUED before Ruth B. Ginsburg, Williams and D.H. Ginsburg, CJs (BIN 47-3)

(X) 01-21-87 4-Letter from counsel for appellant advising of additional authorities pursuant to FRAP 28(j) (m-21) (25)

(W) 01-26-87 4-Letter from counsel for appellee advising of additional authorities pursuant to FRAP 28(j) (p-26)

(J) 01-30-87 Per Curiam order that because we are unable to determine the precise scope of the district court's order denying plaintiffs' motion, we hereby remand the record in this case for clarification (see order for details). Ruth B. Ginsburg, Williams and D.H. Ginsburg, CJs.

(J) 02-03-87 Copy of above order and original record sent to Clerk, District Court

(X) 04-15-87 4-Letter from counsel for appellee advising of additional authorities pursuant to FRAP 28(j) (p-14) (25)

(C) 06-09-87 SUPPLEMENTAL CERTIFIED ORIGINAL ON REMAND (2 pleadings)

(C) 06-17-87 Per curiam order that in view of the briefs filed by the parties before the district court upon remand of the record, the court sees no need for further briefing. However, the court grants the request of the Plaintiffs' Steering Committee to this extent. No later than June 24, 1987, either party, or both parties, may file an additional brief or memorandum. If both parties filed, the filing should be simultaneous. If such an additional brief or memorandum is filed, it should not exceed ten pages, and should not duplicate argument presented to the district court in the briefs identified above. The parties are additionally admonished not to reargue the issue addressed in the briefs previously submitted in this appeal. Should either or both parties decide not to file a further brief or memorandum, counsel should so notify the court forthwith. Ruth B. Ginsburg, Williams and D.H. Ginsburg, CJ's

(X) 06-19-87 4-Letter from counsel for appellee advising that they will not submit additional brief (m-19) (25)

(X) 06-23-87	4-Letter from counsel for appellant advising it will not submit a further brief (p-23) (25)
(R) 06-29-87	Order mailed to George N. Thompkins, Jr. by first class mail dated June 17, 1987 returned "addressee unknown" [13]
(D) 09-25-87	Opinion for the Court filed by Circuit Judge Ruth B. Ginsburg.
(D) 09-25-87	Concurring opinion filed by Circuit Judge D.H. Ginsburg, in which Circuit Judge Williams joins.
(D) 09-25-87	Judgment by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.
(D) 09-25-87	Mandate order.
(R) 10-06-87	5-Appellee's bill of cost (Korean Air Lines Co.) (m-2) [9]
(R) 10-23-87	23-Appellant's motion for rehearing en banc (m-22) [1]
(J) 11-16-87	Per Curiam order en banc that the petition of plaintiffs' Steering Committee for rehearing en banc is denied. CJ Wald, Robinson, Mikva, Edwards, Ruth B. Ginsburg, Bork, Starr, Silberman, Buckley, Williams, D.H. Ginsburg and Sentelle, CJs.
(D) 11-27-87	MANDATE ISSUED. Costs are awarded to Korean Air Lines Co., Ltd. in the amount of $1,041.24 and taxed against plaintiff's Steering Committee.
(R) 11-30-87	Order mailed to Desmond T. Barry, Jr. by first class mail dated 11-16-87 returned "moved not forwardable—adressee unknown" [13]
(J) 12-15-87	Above order was remail to Barry, Jr. to his New York office on 12-15-87
(R) 01-12-88	Notice from Clerk, Supreme Court advising that petition for certiorari was filed in SC #87- 1055 on 12-23-87 [1]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL Docket No. 565
Misc. Docket No. 83-0345

Civil Action Nos. 83-2793, 2794, 2941, 3007, 3154, 3177, 3204, 3448, 3449, 3450, 3451, 3452, 3453, 3454, 3455, 3456, 3457, 3458, 3459, 3460, 3461, 3462, 3463, 3464, 3465, 3466, 3467, 3468, 3469, 3470, 3473, 3474, 3587, 3588, 3678, 3792, 3793, 3889, 3890, 3891, 3898, 3902, 3903; 84-0029, 0030, 0133, 0402

IN RE: KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1983

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST KOREAN AIR LINES

Plaintiffs in the above cited cases, by Plaintiffs' Steering Committee, hereby move this Court pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 1-9(h), for partial summary judgment in two separate branches: first, that Korean Air Lines is liable without fault for compensatory damages without any limitation of $75,000 and second, that Korean Air Lines shall promptly pay $75,000 to the plaintiff for the benefit of the family of each pasenger in the above actions. In support of their Motion, plaintiffs rely on the Statement of Material Facts, the Exhibits identified by an Attorney's Affidavit and the accompanying Memorandum of Law.

Dated: February 15, 1984

Respectfully submitted,

Plaintiffs' Steering Committee
Donald W. Madole, and Milton G. Sincoff,
Co-Chairmen, and
George E. Farrell and F. Lee Bailey

By: /s/ DONALD W. MADOLE
Donald W. Madole, Co-Chairman

By: /s/ MILTON G. SINCOFF
Milton G. Sincoff, Co-Chairman

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL Docket No. 565
Misc. Docket No. 83-0345

Civil Action Nos. 83-2793, 2794, 2941, 3007, 3154, 3177, 3204, 3448, 3449, 3450, 3451, 3452, 3453, 3454, 3455, 3456, 3457, 3458, 3459, 3460, 3461, 3462, 3463, 3464, 3465, 3466, 3467, 3468, 3469, 3470, 3473, 3474, 3587, 3588, 3678, 3792, 3793, 3889, 3890, 3891, 3898, 3902, 3903; 84-0029, 0030, 0133, 0402

IN RE: KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1983

PLAINTIFFS' STATEMENT OF MATERIAL FACTS PURSUANT TO RULE 1-9 (h)

Plaintiffs' Steering Committee, pursuant to the Court's Rule 1-9(h), and in support of the motion for partial summary judgment against Korean Air Lines, respectfully submits the following statement of material facts as to which the PSC contends there is no genuine issue.

In the event that Korean Air Lines denies any of the following facts as to a particular action, but not as to all actions, then Korean Air Lines is requested to identify each such action.

1. All actions identified on Appendices A and B name decedents who were passengers on Korean Air Lines flight 007 on September 1, 1983.

2. During that flight, all of said passengers died.

3. Each of said passengers was aboard the plane pursuant to a ticket listing places which constituted "international transportation" as defined by Article 1 of the Warsaw Convention.

4. In 1969, Korean Air Lines signed Exhibit 1, commonly known as the Montreal Agreement.

5. Exhibit 1 was in effect on September 1, 1983.

6. Exhibit 2 is the Foreign Air Carrier permit issued by the United States to Korean Air Lines.

7. Exhibit 2 was in effect on September 1, 1983.

8. Each passenger identified in actions on Appendix A had a ticket coupon of which the auditor's coupon in Exhibit 3 is a copy.

9. Each passenger identified in actions on Appendix A received ticket booklet "2", "3" or "4" in Exhibit 4.

10. Each ticket booklet "2", "3" and "4" in Exhibit 4 contained the "Advice to International Passengers on Limitation of Liability" printed in 8-point type size print or less.

11. Compensatory damages caused by the death of each passenger identified in actions on Appendix B is $75,000 or more.

Dated: February 15, 1984

PLAINTIFFS' STEERING COMMITTEE
Donald W. Madole and Milton G. Sincoff,
Co-Chairmen, and
George E. Farrell and F. Lee Bailey

By: /s/ DONALD W. MADOLE
Donald W. Madole, Co-Chairman

By: /s/ MILTON G. SINCOFF
Milton G. Sincoff, Co-Chairman

Appendix A

In numerical order, the cases identified below seek partial summary judgment that Korean Air Lines is liable without fault for full compensatory damages without the $75,000 limitation.

Civil Action No.	*Plaintiff*	*Passenger*	*Plaintiff's Attorney*	*Action Originally Commenced*
83-2794	Ho	Yuk Yee Ho	Speiser	D.C.
83-3007	Chee	Ho Ming Tai	Speiser	D.C.
83-3448	Lim	Jong Jin Lim	Bailey	S.D.N.Y.
83-3450	WuDunn	Sirena WuDunn	Kreindler	S.D.N.Y.
83-3454	Yoo	Chung Soo Yoo	Kreindler	S.D.N.Y.
83-3457	Ting	Shin Jen Ma	Bailey	S.D.N.Y.
83-3458	Swift	Frances Swift	Bailey	S.D.N.Y.
83-3459	Park	Hane Tae Park	Bailey	S.D.N.Y.
83-3463	Ephaimson-Abt	Alice Ephaimson-Abt	Baker	S.D.N.Y.
83-3465	Chan	Amado Chan	Kreindler	E.D.N.Y.
83-3466	Chan	Joseph Chan	Kreindler	E.D.N.Y.
83-3469	Chambers	Joyce Chambers	Charfoos	E.D. Mich.
83-3470	Jones	Margret Zarif	Thurswell	E.D. Mich.

Civil Action No.	*Plaintiff*	*Passenger*	*Plaintiff's Attorney*	*Action Originally Commenced*
83-3473	Simmons	Lucille Dawson	Aven	E.D. Mich.
83-3678	Chi	Michael Kai Fai	Speiser	D.C.
83-3792	Maikovich	Allen Kohn	Speiser	D.C.
83-3792	Maikovich	Lillian Kohn	Speiser	D.C.
83-3890	Lin	San Mei Lin	Speiser	D.C.
83-3898	Nassief	Anthony Nassief	McHugh	S.D.N.Y.
83-3902	Zickerman	Muriel Kole	Needham	D. Mass.
83-3903	James	Hazel James	Chambers	E.D. Mich.
84-0029	Cruz	Alfredo Cruz	Kreindler	S.D.N.Y.
84-0133	Wai	Marilou Covey	Speiser	D.C.

Appendix B

In numerical order, the cases identified below seek partial summary judgment directing Korean Air Lines to promptly pay $75,000 to the family of each passenger.

Civil Action No.	*Plaintiff*	*Passenger*	*Plaintiff's Attorney*	*Action Originally Commenced*
83-2793	Dooley	Cecilio Chuapoco	Speiser	D.C.
83-2794	Ho	Yuk Yee Ho	Speiser	D.C.
83-2941	Ocampo	Suellen Ocampo	Speiser	D.C.
83-2941	Ocampo	Corazon Ocampo	Speiser	D.C.
83-2941	Ocampo	Cecelia Ocampo	Speiser	D.C.
83-3007	Chee	Ho Ming Tai	Speiser	D.C.
83-3154	Lombard	Donald Lombard	Speiser	D.C.
83-3177	Powrie	Ian Powrie	Speiser	D.C.
83-3204	Lombard	Aiden Lombard	Speiser	D.C.
83-3448	Lim	Jong Jin Lim	Bailey	S.D.N.Y.
83-3449	Oren	William Oren	Kreindler	S.D.N.Y.
83-3450	WuDunn	Sirena WuDunn	Kreindler	S.D.N.Y.
83-3451	Bevins	Richard Bevins	Kreindler	S.D.N.Y.
83-3452	Bolante	Maria Bolante	Kreindler	S.D.N.Y.

Civil Action No.	*Plaintiff*	*Passenger*	*Plaintiff's Attorney*	*Action Originally Commenced*
83-3453	Caltabellatta	Mary Chuapoco	Kreindler	S.D.N.Y.
83-3454	Yoo	Chung Soo Yoo	Kreindler	S.D.N.Y.
83-3455	Bolante	Eusebio Bolante	Kreindler	S.D.N.Y.
83-3456	Hong	Hyong Hong	Kreindler	S.D.N.Y.
83-3457	Ting	Shin Jen Ma	Bailey	S.D.N.Y.
83-3458	Swift	Frances Swift	Bailey	S.D.N.Y.
83-3459	Park	Hane Tae Park	Bailey	S.D.N.Y.
83-3460	Lee	Eun Hyung Lee	Bailey	S.D.N.Y.
83-3461	Lim	Jong Lim	Bailey	S.D.N.Y.
83-3462	Oh	Anna Song	Bailey	S.D.N.Y.
83-3463	Ephaimson-Abt	Alice Ephaimson-Abt	Baker	S.D.N.Y.
83-3464	Yun	Ei Sik Yun	Kreindler	E.D.N.Y.
83-3465	Chan	Amado Chan	Kreindler	E.D.N.Y.
83-3466	Chan	Joseph Chan	Kreindler	E.D.N.Y.
83-3467	Beirn	James Biern	Baker	E.D.N.Y.
83-3468	Speir	Kathy Speir	Baker	E.D.N.Y.
83-3469	Jones	Joyce Chambers	Charfoos	E.D. Mich.
83-3470	Jones	Margret Zarif	Thurswell	E.D. Mich.

Civil Action No.	*Plaintiff*	*Passenger*	*Plaintiff's Attorney*	*Action Originally Commenced*
83-3473	Simmons	Lucille Dawson	Aven	E.D. Mich.
83-3474	Bayona	Anita Bayona	Lombardi	D.N.J.
83-3474	Bayona	Lilia Bayona	Lombardi	D.N.J.
83-3587	Forman	Evelyn Forman	Speiser	D.C.
83-3588	Putong	Jovita Putong	Speiser	D.C.
83-3678	Chi	Michael Kai Fai	Speiser	D.C.
83-3792	Maikovich	Allen Kohn	Speiser	D.C.
83-3792	Maikovich	Lillian Kohn	Speiser	D.C.
83-3793	Zareh	Darioush Zareh	Speiser	D.C.
83-3889	Oldham	John Oldham	Speiser	D.C.
83-3890	Lin	San Mei Lin	Speiser	D.C.
83-3891	Martoche	Min Sik Park	Speiser	D.C.
83-3891	Martoche	Ahe Kyung Park	Speiser	D.C.
83-3898	Nassief	Anthony Nassief	McHugh	S.D.N.Y.
83-3902	Zickerman	Muriel Kole	Needham	D. Mass.
83-3903	James	Hazel James	Chambers	E.D. Mich.
84-0029	Cruz	Alfredo Cruz	Kreindler	S.D.N.Y.
84-0030	Caltabellatta	Celita Chuapoco	Kreindler	S.D.N.Y.
84-0133	Wai	Marilou Covey	Speiser	D.C.
84-0402	Baek	Yun J. Baek	Bailey	S.D.N.Y.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL Docket No. 565
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IN RE: KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1983

AFFIDAVIT IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST KOREAN AIR LINES

State of New York)
) SS.:
County of New York)

Milton G. Sincoff, being duly sworn, deposes and says:

I am Co-Chairman of Plaintiffs' Steering Committee which has been authorized by the plaintiffs' attorneys in the actions identified above to bring this motion.

This affidavit is respectfully submitted in support of said plaintiffs' motion for partial summary judgment against Korean Air Lines.

Attached as Exhibit 1 is the Montreal Agreement executed by Korean Air Lines in 1969 and in effect on September 1, 1983.

Exhibit 2 is the Foreign Air Carrier Permit issued by the United States to Korean Air Lines and in effect on September 1, 1983.

Exhibit 3 contains ticket documentation produced by Korean Air Lines for each passenger identified on Appendix A.

Exhibit 4 contains ticket booklets "2", "3" and "4" produced by Korean Air Lines. Each of the passengers identified on Appendix A received ticket booklet "2", "3" or "4".

Exhibit 5 contains the transcript of the document production session of Korean Air Lines on January 13, 1984. At that session, the attorney for Korean Air Lines stated that to the best of its information and belief at that time the passengers whose names appear on the tickets produced were in fact passengers aboard the flight (pages 8-9).

Exhibit 6 contains the affidavits of two qualified printers, Gilbert Richman and Michael Minnicino.

Exhibit 7 contains the affidavits submitted on behalf of plaintiffs who seek immediate payment of $75,000 from Korean Air Lines.

WHEREFORE, plaintiffs' motion should be granted.

/s/ MILTON G. SINCOFF
Milton G. Sincoff

Sworn to before me this
15th day of February, 1984.

/s/ CYNTHIA AVINO
Notary Public

CYNTHIA AVINO
Notary Public, State of New York
No. 41-4779354
Qualified in Queens County
Commission Expires March 30, 1985

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL Docket No. 565
Misc. Docket No. 83-0345

Civil Action Nos. 83-2793, 2794, 2941, 3007, 3154, 3177, 3204, 3448, 3449, 3450, 3451, 3452, 3453, 3454, 3455, 3456, 3457, 3458, 3459, 3460, 3461, 3462, 3463, 3464, 3465, 3466, 3467, 3468, 3469, 3470, 3473, 3474, 3587, 3588, 3678, 3792, 3793, 3889, 3890, 3891, 3898, 3902, 3903; 84-0029, 0030, 0133, 0402

IN RE: KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1983

EXHIBITS

ACCOMPANYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST KOREAN AIRLINES

Dated: February 17, 1984

Plaintiffs' Steering Committee
Donald W. Madole, and Milton G. Sincoff,
Co-Chairmen, and
George E. Farrell and F. Lee Bailey

EXHIBIT 1

AGREEMENT

The undersigned carriers (hereinafter referred to as "the Carriers") hereby agree as follows:

1. Each of the Carriers shall effective May 16, 1966, include the following in its conditions of carriage, including tariffs embodying conditions of carriage filed by it with any government:

> "The Carrier shall avail itself of the limitation of liability provided in the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw October 12th, 1929, or provided in the said Convention as amended by the Protocol signed at The Hague September 28th, 1955. However, in accordance with Article 22(1) of said Convention, or said Convention as amended by said Protocol, the Carrier agrees that, as to all international transportation by the Carrier as defined in the said Convention or said Convention as amended by said Protocol, which, according to the Contract of Carriage, includes a point in the United States of America, as a point of origin, point of destination, or agreed stopping place.
>
> (1) The limit of liability for each passenger for death, wounding, or other bodily injury shall be the sum of US $75,000 inclusive of legal fees and costs, except that, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit shall be the sum of US $58,000 exclusive of legal fees and costs.
>
> (2) The Carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of said Convention or said Convention as amended by said Protocol.

Nothing herein shall be deemed to affect the rights and liabilities of the Carrier with regard to any claim brought by, on behalf of, or in respect of any person who has wilfully caused damage which resulted in death, wounding, or other bodily injury of a passenger."

2. Each carrier shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention, or the Convention as amended by the Hague Protocol, and by the special contract described in paragraph 1, the following notice, which shall be printed in type at least as large as 10 point modern type and in ink contrasting with the stock on (i) each ticket; (ii) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket, or (iii) on the ticket envelope:

"ADVICE TO INTERNATIONAL PASSENGER ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of certain (name of carrier) and certain other* carriers parties to such special contracts for death of or personal injury to passengers is limited in most cases to proven damages not to exceed US $75,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers travelling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately US $8,290 or US $16,580.

The names of Carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information please consult your airline or insurance company representative."

* Either alternative may be used.

3. This Agreement shall be filed with the Civil Aeronautics Board of the United States for approval pursuant to Section 412 of the Federal Aviation Act of 1958, as amended, and filed with other governments as requested. The Agreement shall become effective upon approval by said Board pursuant to said Section 412.

4. This Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with said Civil Aeronautics Board.

5. Any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to said Civil Aeronautics Board and the other Carriers parties to the Agreement.

/s/ CHOONG HOON CHO
Choong Hoon Cho
President
Korean Air Lines, Inc.

EXHIBIT 2

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

Issued pursuant to Order 71-4-161

PERMIT TO FOREIGN AIR CARRIER
(as reissued and amended)

KOREAN AIR LINES CO., LTD.

is hereby authorized, subject to the provisions hereinafter set forth, the provisions of the Federal Aviation Act of 1958, and the orders, rules, and regulations issued thereunder, to engage in foreign air transportation with respect to persons, property, and mail, as follows:

> Between a point or points in the Republic of Korea; intermediate points in Japan; and the coterminal points Honolulu, Hawaii, and Los Angeles, California.

The holder shall be authorized to engage in charter trips in foreign air transportation, subject to the terms, conditions, and limitations prescribed by Part 212 of the Board's Economic Regulations.

This permit shall be subject to the following terms, conditions, and limitations:

(1) Except with respect to flights carrying only cargo and/or mail, all flights which serve Los Angeles, California, shall also serve Honolulu, Hawaii.

(2) The holder shall not ship any cargo handled by Korea Air Terminal Service Co., Ltd. (Republic of Korea) in that company's capacity as an indirect foreign air carrier or IATA cargo

agent; nor shall the holder allow any direct air carrier or international air freight forwarder (including an indirect foreign air carrier) acting as its agent to ship any cargo handled by Korea Air Terminal Service Co., Ltd. (Republic of Korea).

The holder shall not provide foreign air transportation under this permit unless it holds a currently effective authorization from the Government of the Republic of Korea for such operations.

The holder shall conform to the airworthiness and airman competency requirements prescribed by the Government of the Republic of Korea for Korean international air service.

This permit shall be subject to all applicable provisions of any treaty, convention, or agreement affecting international air transportation now in effect, or that may become effective during the period this permit remains in effect, to which the United States and the Republic of Korea shall be parties.

The holder shall keep on deposit with the Board a signed counterpart of CAB Agreement 18900, an agreement relating to liability limitations of the Warsaw Convention and the Hague Protocol approved by Board Order E-23680, May 13, 1966, and a signed counterpart of any amendment or amendments to such agreement which may be approved by the Board and to which the holder becomes a party.

The holder (1) shall not provide foreign air transportation under this permit unless there is in effect third-party liability insurance in the amount of $1,000,000 or more to meet potential liability claims which may arise in connection with its operations under this permit, and unless there is on file with the Docket Section of the Board a statement showing the name and address of the insurance carrier and the amounts and liability limits of the third-party liability insurance provided, and (2) shall not provide foreign air transportation with respect to persons unless there is in effect liability insurance sufficient to cover the obligations assumed in CAB Agreement 18900, and unless there is on file with the Docket Section of the Board a statement showing the name and address of the insurance carrier and the amounts and liability limits of the passenger liability insurance provided. Upon request, the Board may authorize

the holder to supply the name and address of an insurance syndicate in lieu of the names and addresses of the member insurers.

By accepting this permit the holder waives any right it may possess to assert any defense of sovereign immunity from suit in any action or proceeding instituted against the holder in any court or other tribunal in the United States (or its territories or possessions) based upon any claim arising out of operations by the holder under this permit.

The exercise of the privileges granted hereby shall be subject to such other reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board.

This permit shall be *effective on April 23, 1971*. Unless otherwise terminated at an earlier date pursuant to the terms of any applicable treaty, convention, or agreement, this permit shall terminate (1) upon the effective date of any treaty, convention, or agreement, or amendment thereto, which shall have the effect of eliminating the route hereby authorized from the route which may be operated by airlines designated by the Government of the Republic of Korea, or (2) upon the effective date of any permit granted by the Board to any other carrier designated by the Government of the Republic of Korea in lieu of the holder hereof, or (3) upon the termination or expiration of the Air Transport Agreement between the Government of the United States and the Government of the Republic of Korea, dated April 24, 1957, and amended by an exchange of notes effective March 26, 1971: *Provided, however*, That if prior to the occurrence of the event specified in clause (3) of this paragraph, the operation of the foreign air transportation herein authorized becomes the subject of any treaty, convention, or agreement to which the United States and the Republic of Korea are or shall become parties, then and in that event this permit is continued in effect during the period provided in such treaty, convention, or agreement.

IN WITNESS WHEREOF, the Civil Aeronautics Board has caused this permit to be executed by the Secretary of the Board, and the seal of the Board to be affixed hereto, on the 5th day of April, 1971.

/s/ _____
Phyllis T. Kaylor
Acting Secretary

(SEAL)

Issuance of this permit to
the holder approved by the
President of the United States
on April 23, 1971,
in Order 71-4-161.

EXHIBIT 3

MDL Docket No. 565
Misc. No. 83-0345
Civil Action No. 83-2794
D.D.C.

ROBERT HO, Individually and as Personal Representative of the Estate of YUK HE HO, deceased, on behalf of himself, of Lam Ho of Kwan Ho, of Pak On Ho and of Pak Chuen Ho. 3041 Curger Avenue Bronx, New York 10467

Plaintiff,

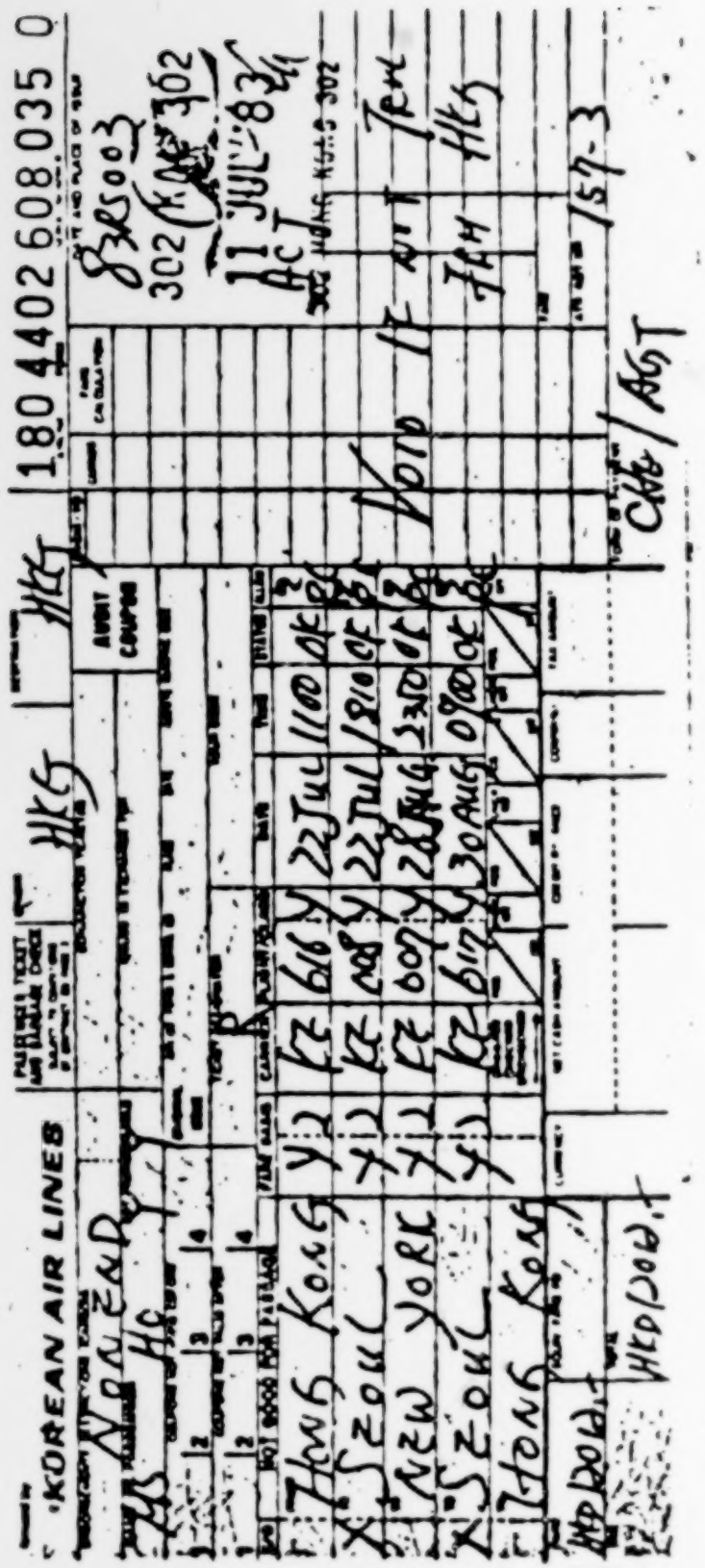
v.

KOREAN AIR LINES, INC. and
THE UNITED STATES OF AMERICA,

Defendants.

Sample Ticket Booklet No.: 4

[See Opposite —]



MDL Docket No. 565
Misc. No. 83-0345
Civil Action No. 83-3007
D.D.C.

HO YAN CHEE, Individually and as Personal Representative of the Estate of HO MING TAI, deceased, Room 607, West Terrace Sai Wan Estate Kennedy Town, Hong Kon

Plaintiff,

v.

KOREAN AIR LINES, INC. and
THE UNITED STATES OF AMERICA,

Defendants.

Sample Ticket Booklet No.: 3

[See Opposite —]

MDL Docket No. 565
Misc. No. 83-0345
Civil Action No. 83-3448
D.D.C.

BETTY B.S. LIM, as Administratix Ad Prosequendum of the Estate of DR. JONG JIN LIM, deceased,

Plaintiff,

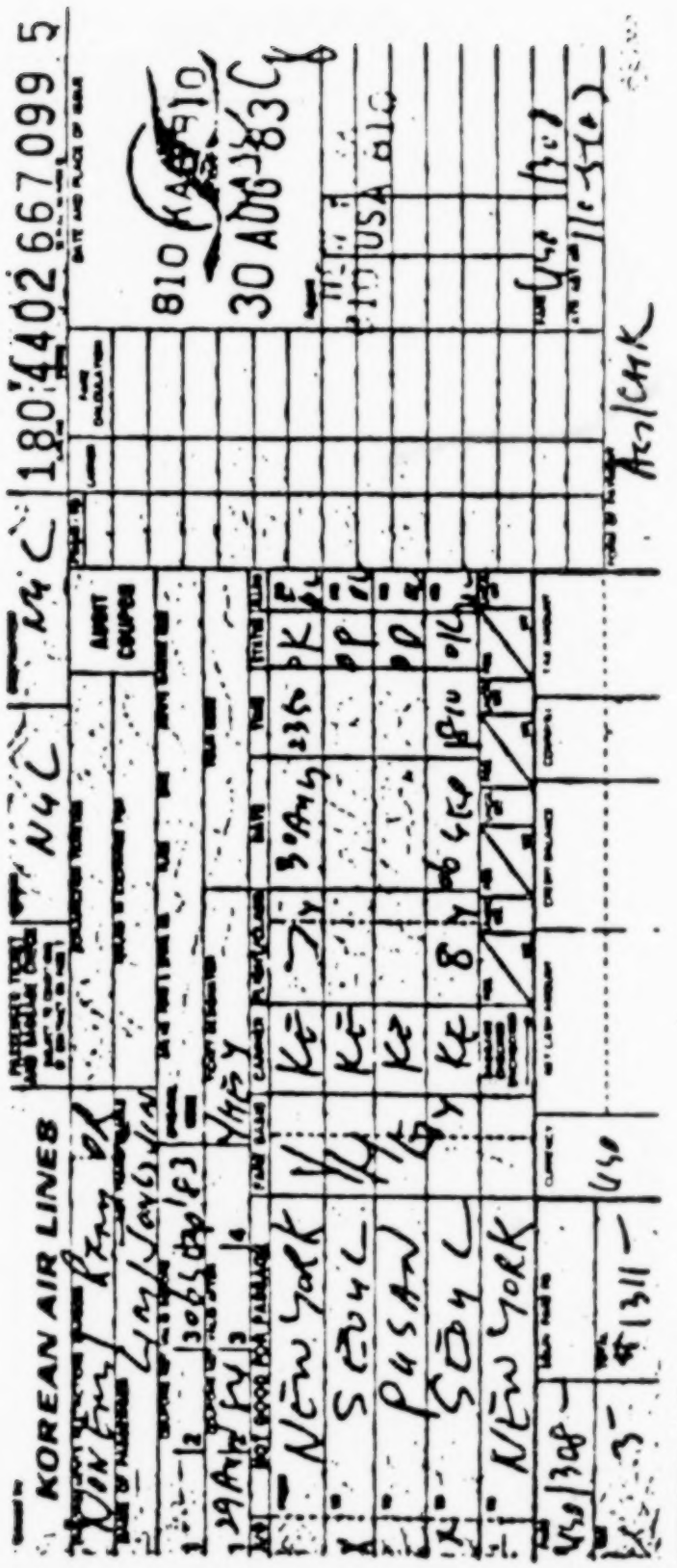
—against—

KOREAN AIR LINES, INC., THE BOEING COMPANY, LITTON INDUSTRIES, INC., and THE UNION OF SOVIET SOCIALIST REPUBLICS,

Defendants.

Sample Ticket Booklet No.: 4

[See Opposite →]



MDL Docket No. 565
Misc. No. 83-0345
Civil Action No. 83-3450
D.D.C.

DAVID WU DUNN, as Personal Representative and Administrator of the Estate of SIRENA WU DUNN, deceased,

Plaintiff,

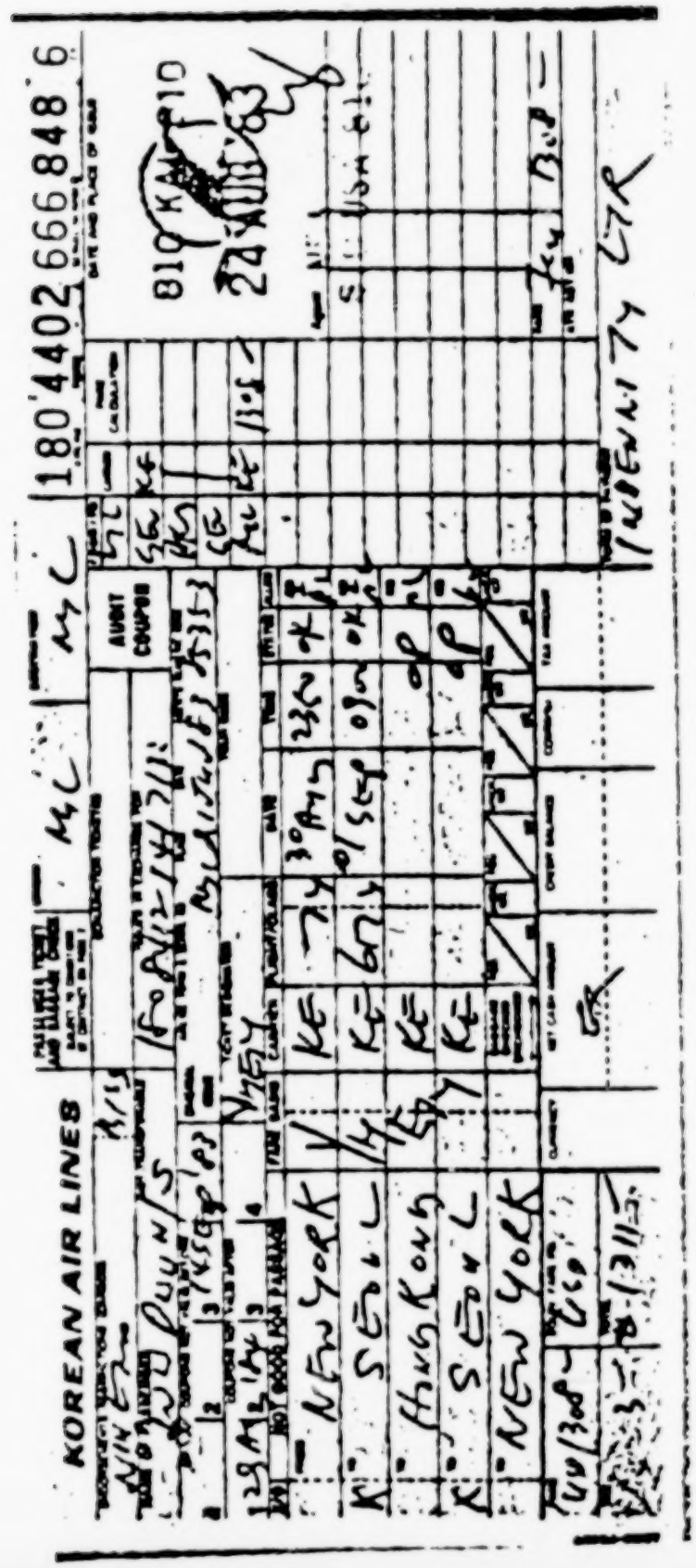
—against—

KOREAN AIR LINES, THE BOEING COMPANY, LITTON INDUSTRIES, INC., and the UNITED STATES

Defendants.

Sample Ticket Booklet No.: 4

[See Opposite →]



MDL Docket No. 565
Misc. No. 83-0345
Civil Action No. 83-3454
D.D.C.

SUNGWHA OH YOO, as Personal Representative and Executrix of the Estate of CHUNG SOO YOO, deceased,

Plaintiff,

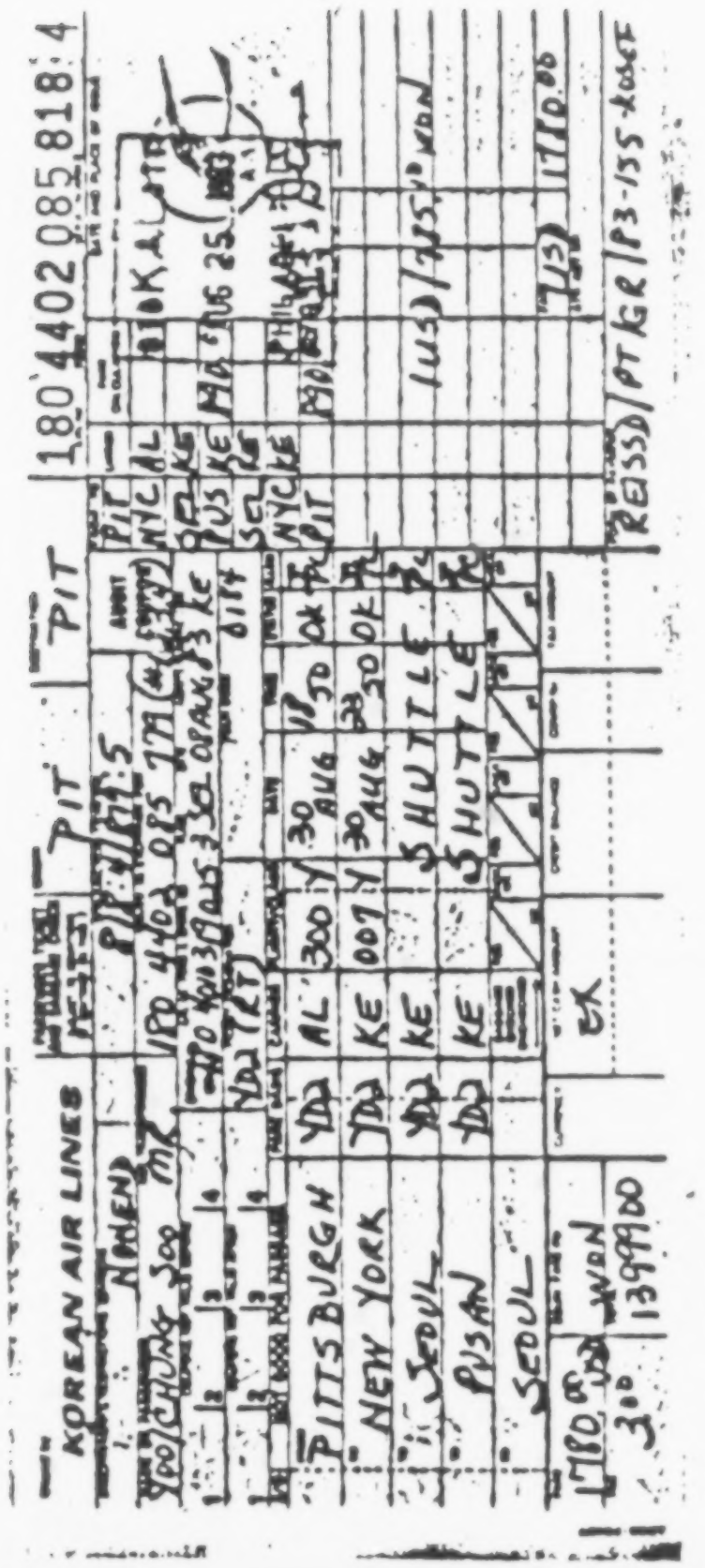
—against—

KOREAN AIR LINES, THE BOEING COMPANY, LITTON INDUSTRIES, INC., and the UNITED STATES

Defendants.

Sample Ticket Booklet No.: 3

[See Opposite —]


KOREAN AIR LINES
PIT
SEOUL
PUSAN
NEW YORK
PITTSBURGH
SEOUL

MDL Docket No. 565
Misc. No. 83-0345
Civil Action No. 83-3457
D.D.C.

CHRISTINA TING, as the Personal Representative of and the Intended Temporary Administratrix of the Goods, Chattels and Credits of SHIH JEN MA, Deceased,

Plaintiff,

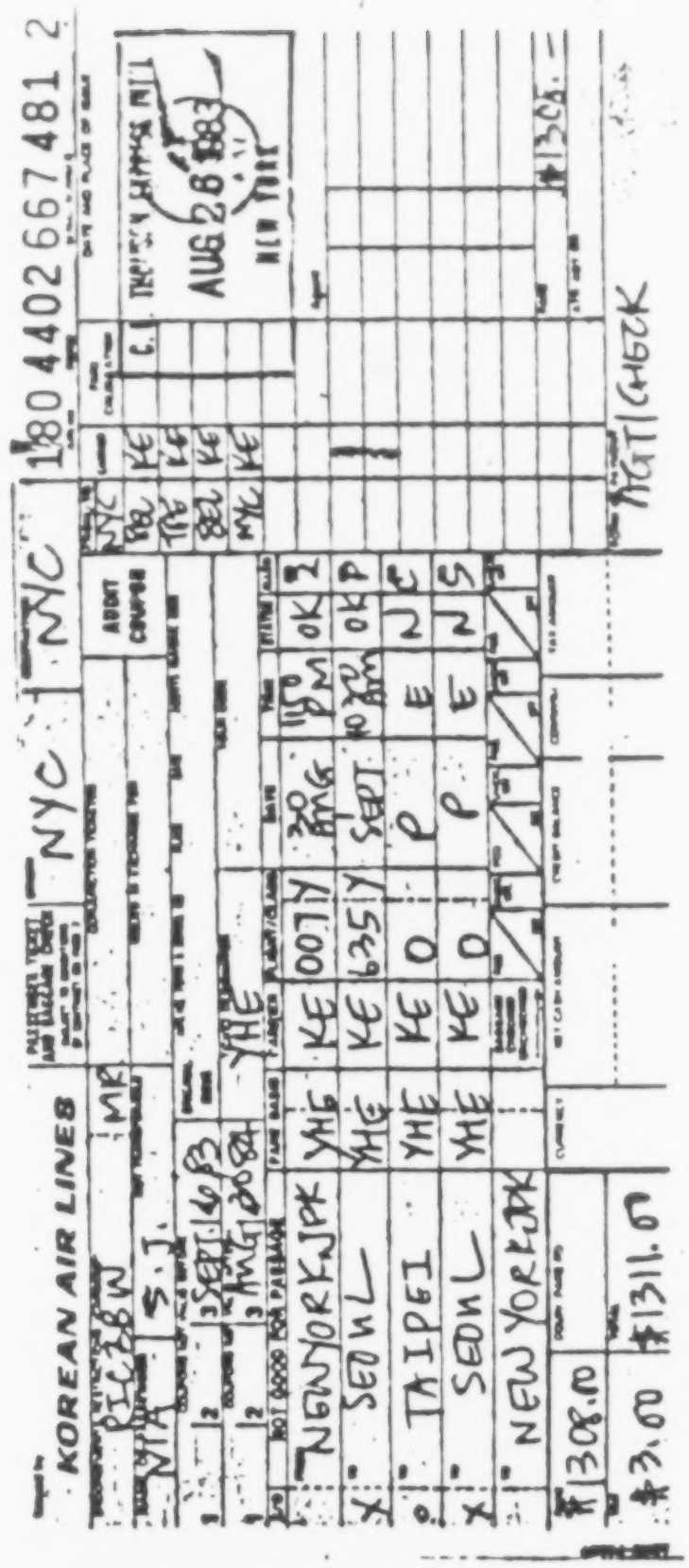
—against—

KOREAN AIR LINES, INC. THE BOEING COMPANY, LITTON INDUSTRIES, INC. and THE UNION OF SOVIET SOCIALIST REPUBLICS,

Defendants.

Sample Ticket Booklet No.: 4

[See Opposite —]



MDL Docket No. 565
Misc. No. 83-0345
Civil Action No. 83-3458
D.D.C.

BARBARA SWIFT, as the Personal Representative of and the Administratrix of the Estate of FRANCES MAE SWIFT, Deceased,

Plaintiff,

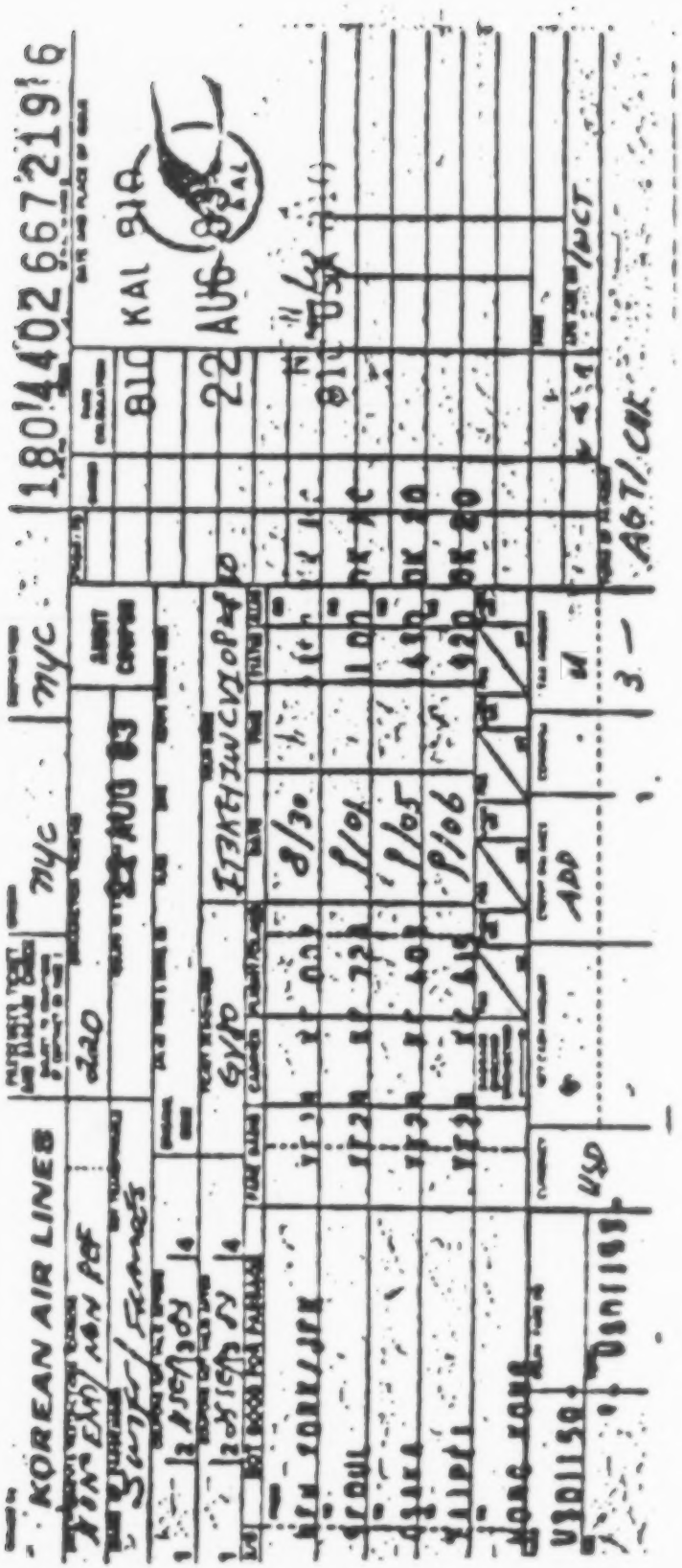
—against—

KOREAN AIR LINES, INC., THE BOEING COMPANY, LITTON INDUSTRIES, INC. and THE UNION OF SOVIET SOCIALIST REPUBLICS,

Defendants.

Sample Ticket Booklet No.: 4

[See Opposite —]



MDL Docket No. 565
Misc. No. 83-0345
Civil Action No. 83-3459
D.D.C.

KYUNG HWA PARK, as the Personal Representative of and the Administratrix of the Estate of HAN TAE PARK, Deceased,

Plaintiff,

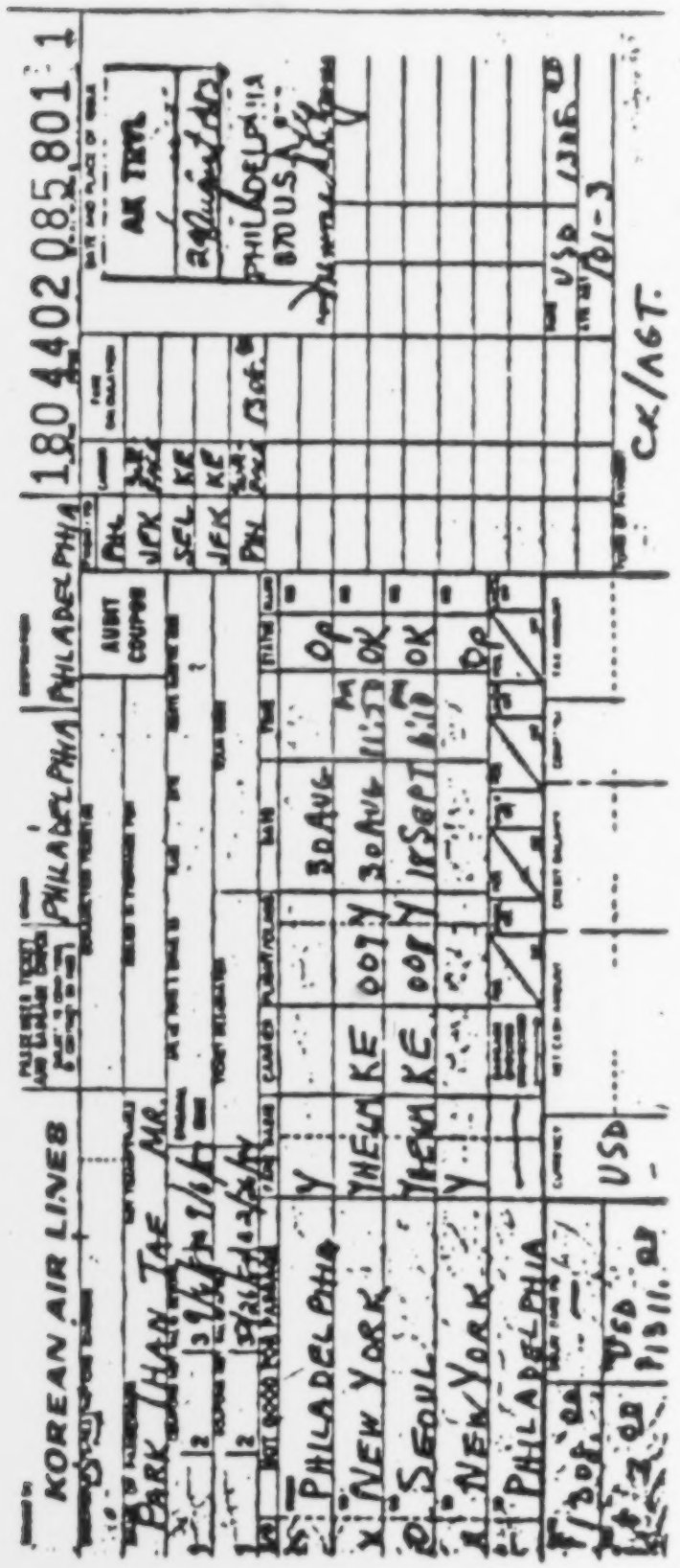
—against—

KOREAN AIR LINES, INC. THE BOEING COMPANY, LITTON INDUSTRIES, INC. and THE UNION OF SOVIET SOCIALIST REPUBLICS,

Defendants.

Sample Ticket Booklet No.: 3

[See Opposite →]



MDL Docket No. 565
Misc. No. 83-0345
Civil Action No. 83-3463
D.D.C.

HANS EPHRAIMSON-ABT, Executor of the Estate of Alice Ephraimson-Abt, deceased,

Plaintiffs,

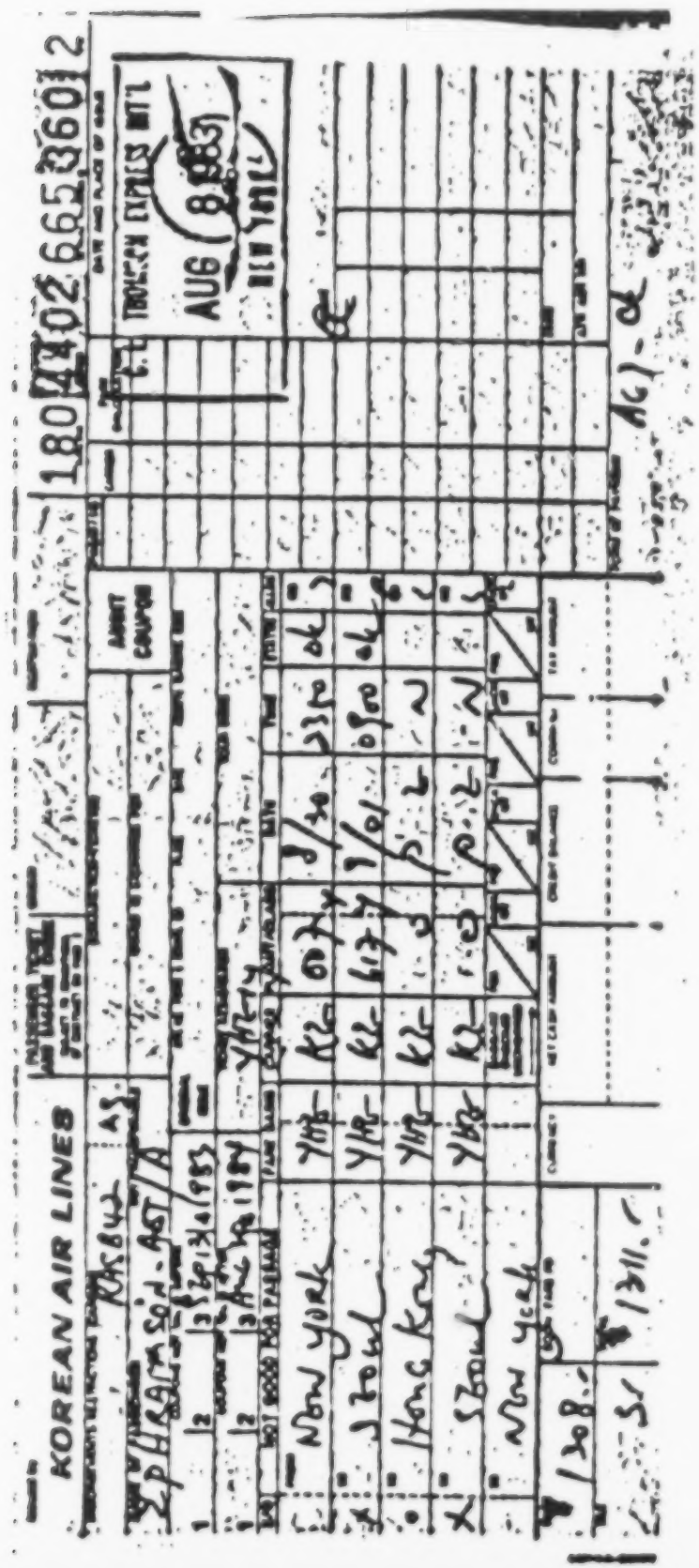
—against—

KOREAN AIR LINES INC., JOHN DOE I, EXECUTOR OF THE ESTATE OF CHUN BYUNG IN, JOHN DOE II, EXECUTOR OF THE ESTATE OF DONG HUI SOHN, JOHN DOE II, EXECUTOR OF THE ESTATE OF EUI DONG KIM; THE BOEING COMPANY; LITTON INDUSTRIES, INC.; AND THE UNION OF THE SOVIET SOCIALIST REPUBLICS,

Defendants.

Sample Ticket Booklet No.: 4

[See Opposite —]



MDL Docket No. 565
Misc. No. 83-0345
Civil Action No. 83-3465
D.D.C.

ELISA E. CHAN, as Personal Representative and Administratrix of the Estate of AMADO E. CHAN, deceased,

Plaintiff,

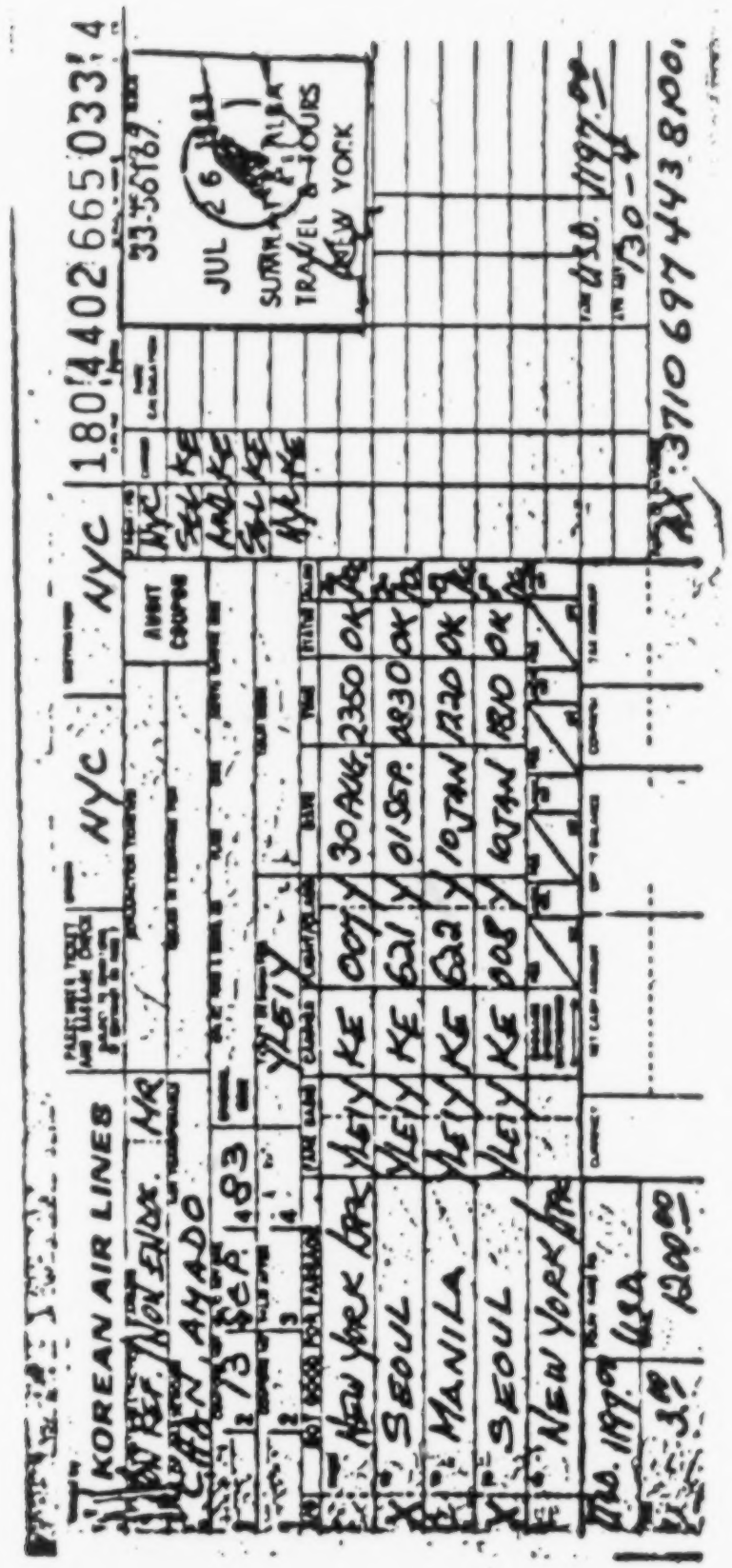
—against—

KOREAN AIR LINES, THE BOEING COMPANY, LITTON INDUSTRIES, INC., and the UNITED STATES,

Defendants.

Sample Ticket Booklet No.: 4

[See Opposite →]



MDL Docket No. 565
Misc. No. 83-0345
Civil Action No. 83-3466
D.D.C.

ELISA E. CHAN, as Personal Representative and Administratrix of the Estate of JOSEPH E. CHAN, deceased,

Plaintiff,

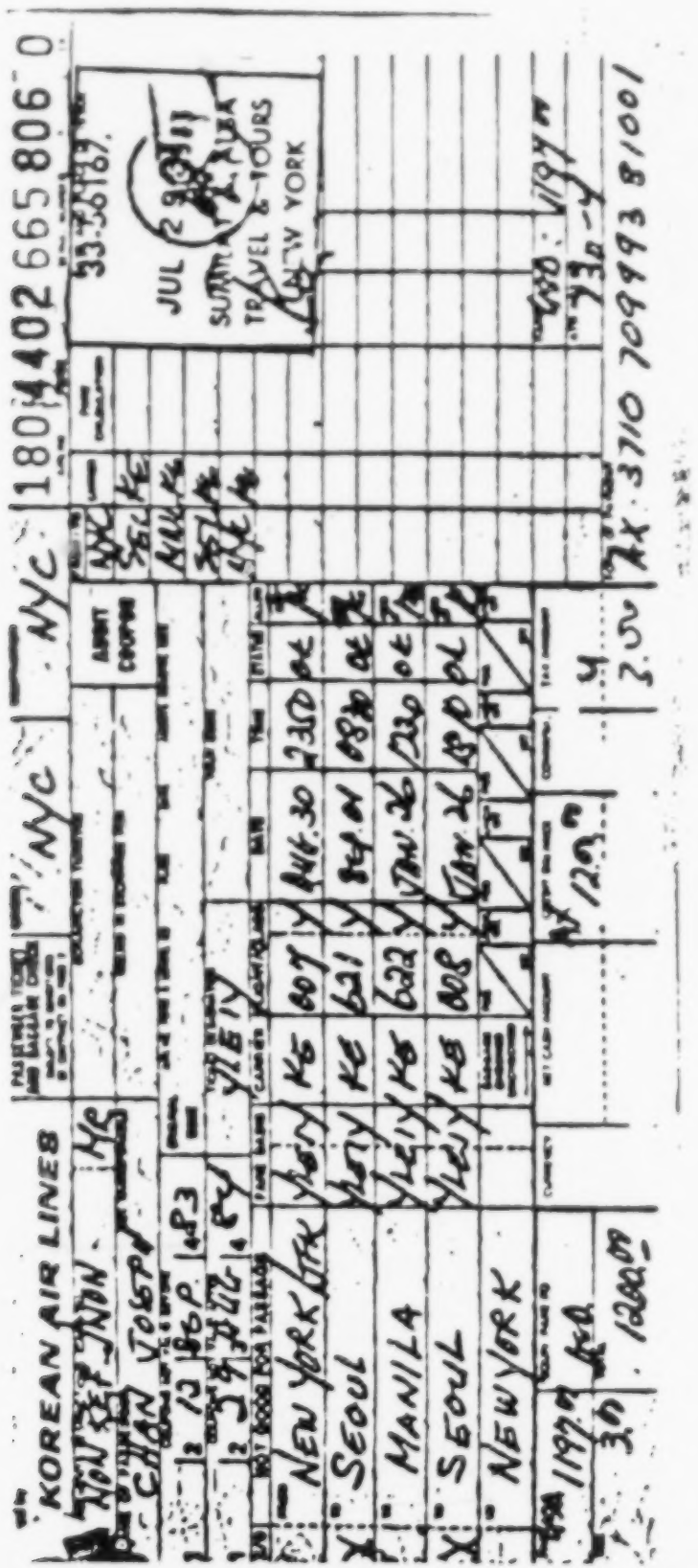
—against—

KOREAN AIR LINES, THE BOEING COMPANY, LITTON INDUSTRIES, INC., and the UNITED STATES,

Defendants.

Sample Ticket Booklet No.: 4

[See Opposite —]



MDL Docket No. 565
Misc. No. 83-0345
Civil Action No. 83-3469
D.D.C.

JAMES L. CHAMBERS and DOROTHY JONES, Administrators of the Estate of JOYCE CHAMBERS, Deceased,

Plaintiff,

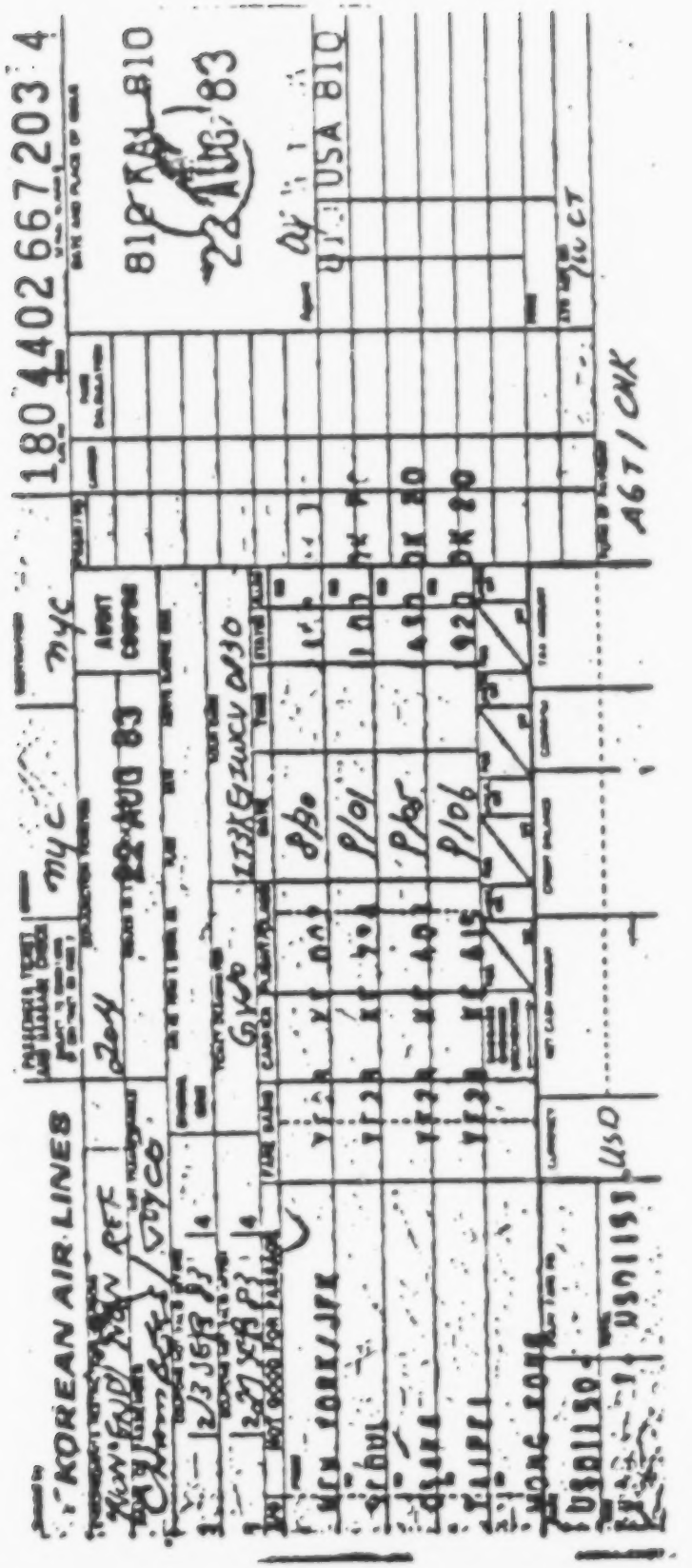
—vs—

KOREAN AIRLINES, INC. a foreign corporation,

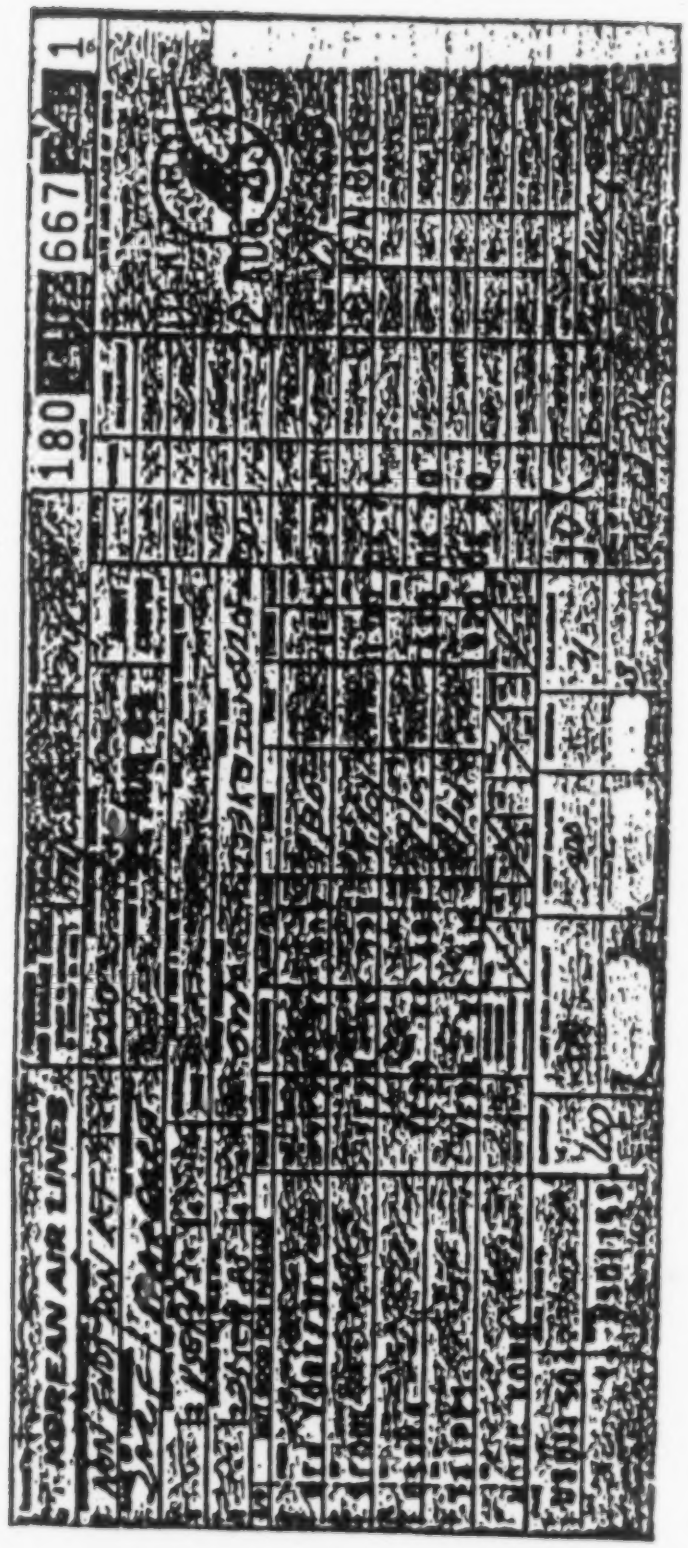
Defendant.

Sample Ticket Booklet No.: 4

[See Opposite →]



83 Civ. 3470
Booklet No. 4



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MDL Docket No. 565
Misc. No. 83-0345
Civil Action No. 83-3473
D.D.C.

ALICE F. SIMMONS, ADMINISTRATRIX OF THE ESTATE OF LUCILLE L.V. DAWSON, DECEASED,

Plaintiff,

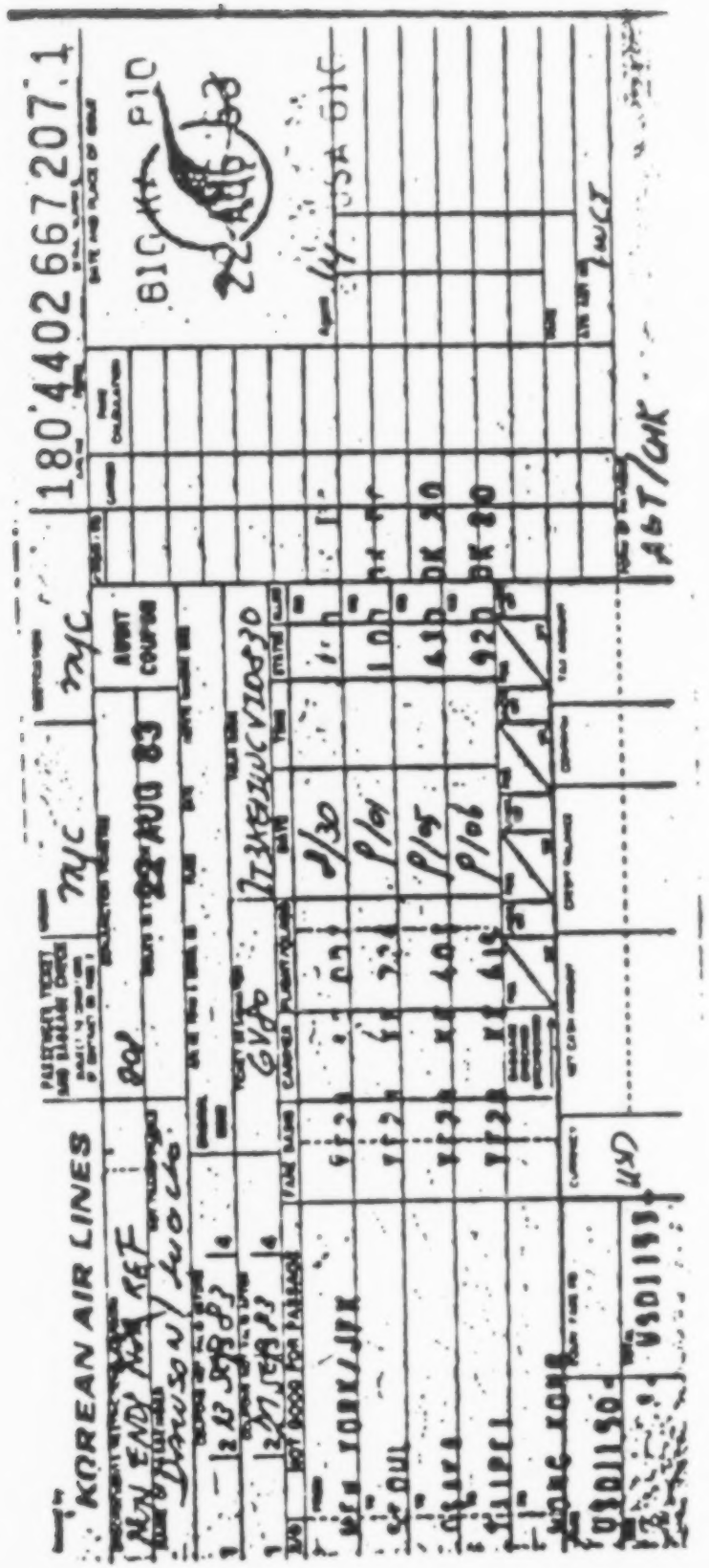
vs.

KOREAN AIRLINES
GOVERNMENT OF THE UNION OF SOVIET SOCIALIST REPUBLICS,

Defendants.

Sample Ticket Booklet No.: 4

[See Opposite →]



MDL Docket No. 565
Misc. No. 83-0345
Civil Action No. 83-3678
D.D.C.

LAM LAP CHI, Individually, as Personal Representative of the Estate of MICHAEL WONG KAI FAI, Deceased, 4 Wah Lok Path, World Fair Court, Flat C, Sixth Floor Hong Kong

Plaintiff,

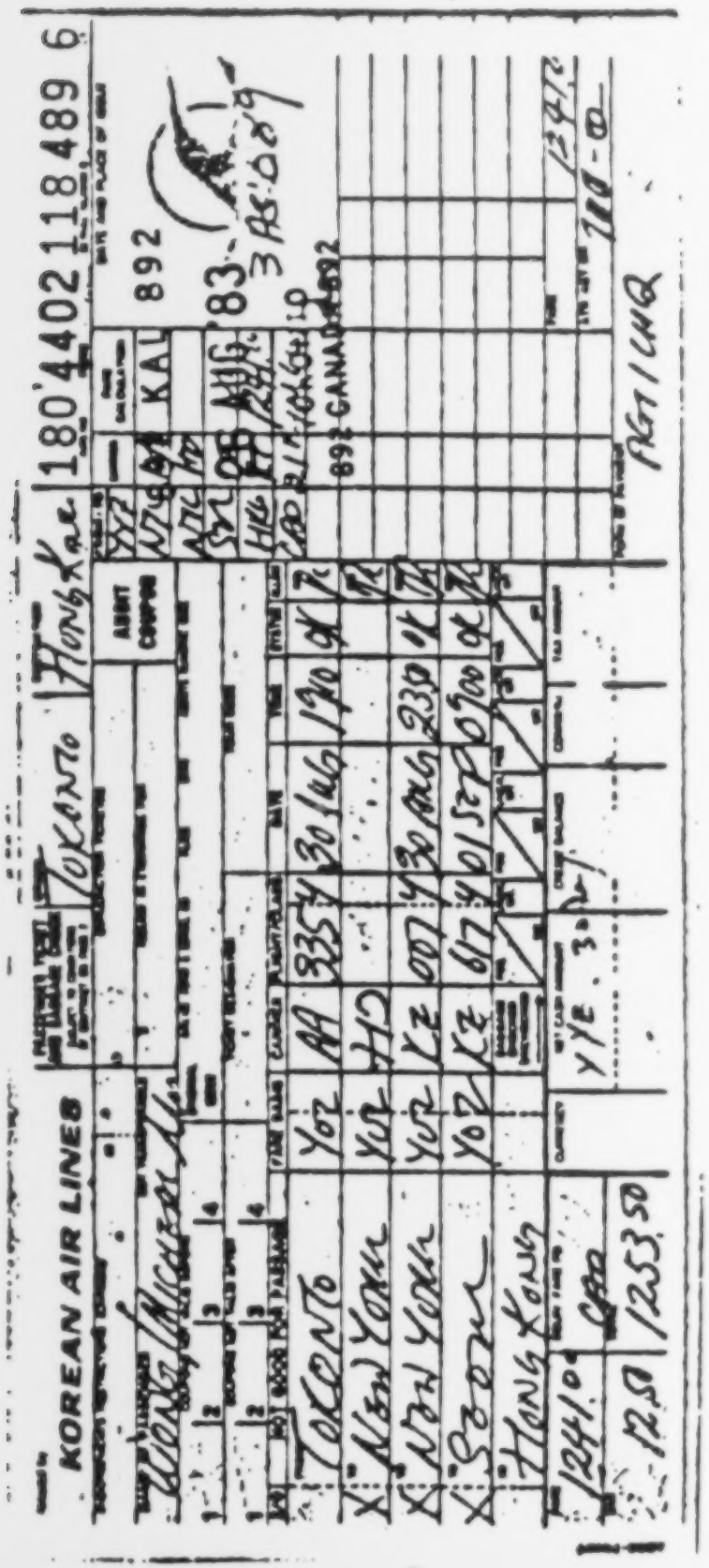
v.

KOREAN AIR LINES CO., LTD. and
THE UNITED STATES OF AMERICA,

Defendants.

Sample Ticket Booklet No.: 3

[See Opposite —]



MDL Docket No. 565
Misc. No. 83-0345
Civil Action No. 83-3792
D.D.C.

MARSHA J.K. MAIKOVICH, Individually and as Administratrix of the Estate of ALLEN DAVID KOHN, deceased, and as Administratrix of the Estate of LILLIAN ROSE KOHN, Deceased 637 Harvard Road, Bala Cynwyd, PA 19004

Plaintiff

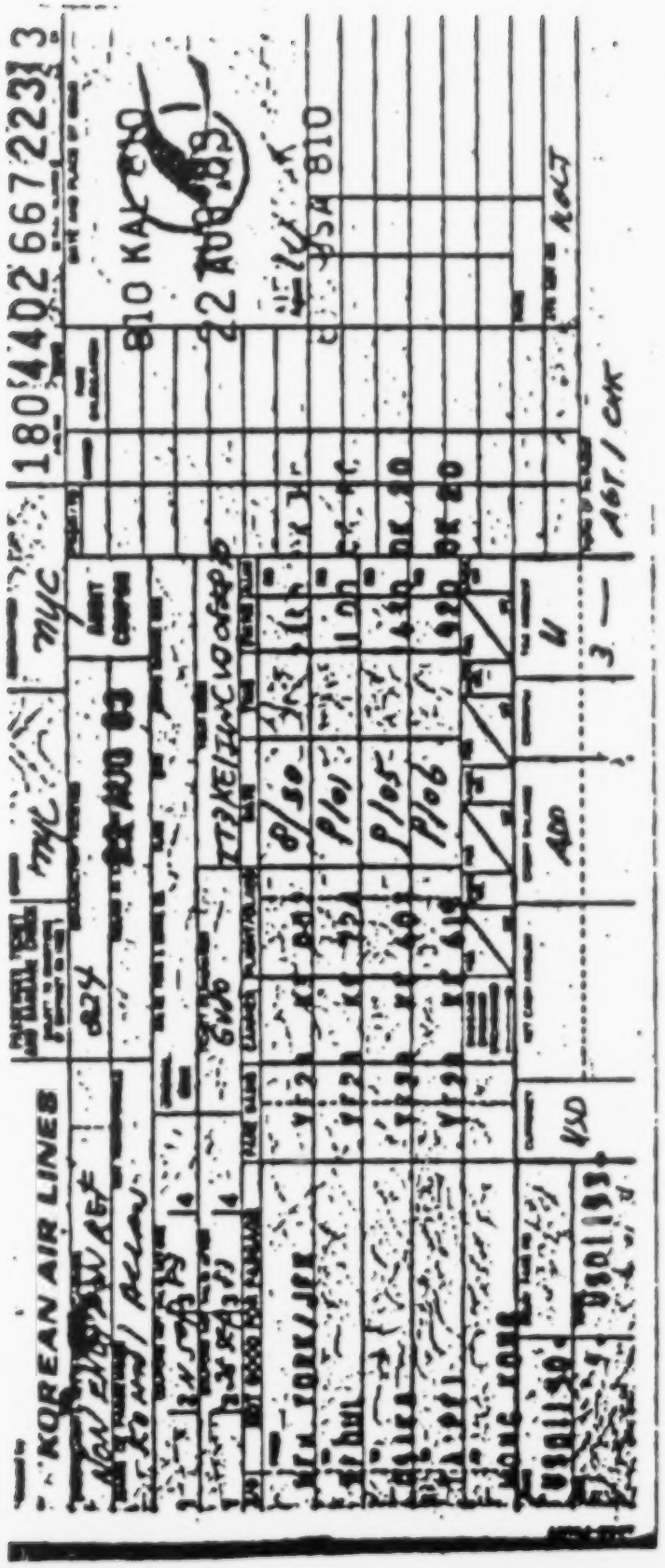
v.

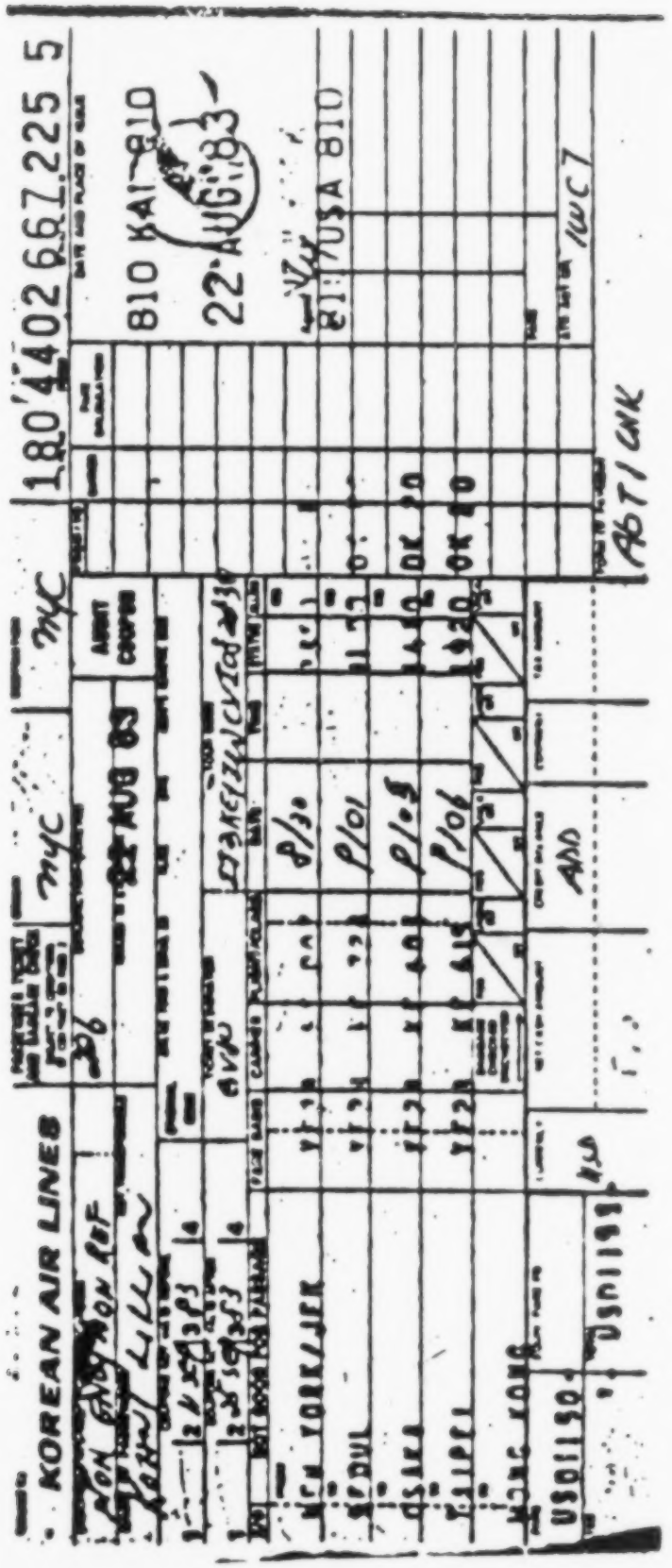
KOREAN AIR LINES, INC. and
THE UNITED STATES OF AMERICA,

Defendants

Sample Ticket Booklet Nos.: 4

[See Opposite →]





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MDL Docket No. 565
Misc. No. 83-0345
Civil Action No. 83-3890
D.D.C.

IN JIG LIN, as Personal Representative of the Estate of SAN MEI LIN, Deceased, 84-48 56th Avenue, Amherst, N.Y. 11373

Plaintiff

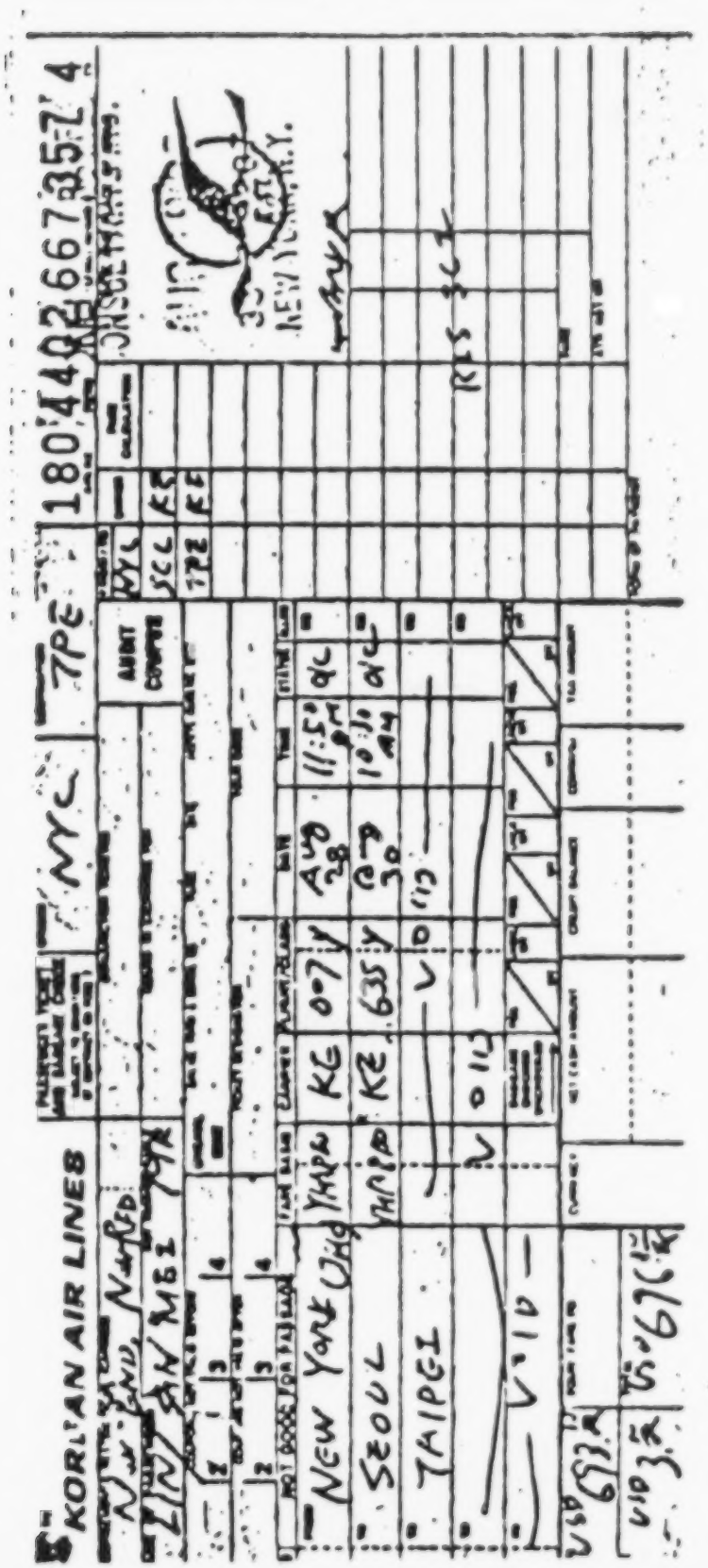
v.

KOREAN AIR LINES CO., LTD. and
THE UNITED STATES OF AMERICA,

Defendants.

Sample Ticket Booklet No.: 4

[See Opposite →]



MDL Docket No. 565
Misc. No. 83-0345
Civil Action No. 83-3898
D.D.C.

LOUELLA MARIA ANTONIA DEFREITAS NASSIEF, as Administratrix of the Estate of ANTHONY NASSIEF, deceased,

Plaintiff,

—against—

KOREAN AIRLINES, INC., JOHN DOE I, Executor of the Estate of CHUN BYUNG IN, JOHN DOE II, Executor of the Estate of DONG HUI SOHN, JOHN DOE II, Executor of the Estate of EUI DONG KIM, THE BOEING COMPANY, LITTON INDUSTRIES, INC., and THE UNION OF SOVIET SOCIALIST REPUBLICS.

Defendants.

Sample Ticket Booklet No.: 4

[See Opposite —]

MDL Docket No. 565
Misc. No. 83-0345
Civil Action No. 83-3902
D.D.C.

MARJORIE ZICHERMAN, INDIVIDUALLY AND AS EXECUTRIX UNDER THE ESTATE OF MURIEL A.M.S. KOLE, and MURIEL MAHALEK, MOTHER AND NEXT OF KIN OF MURIEL A.M.S. KOLE,

Plaintiffs,

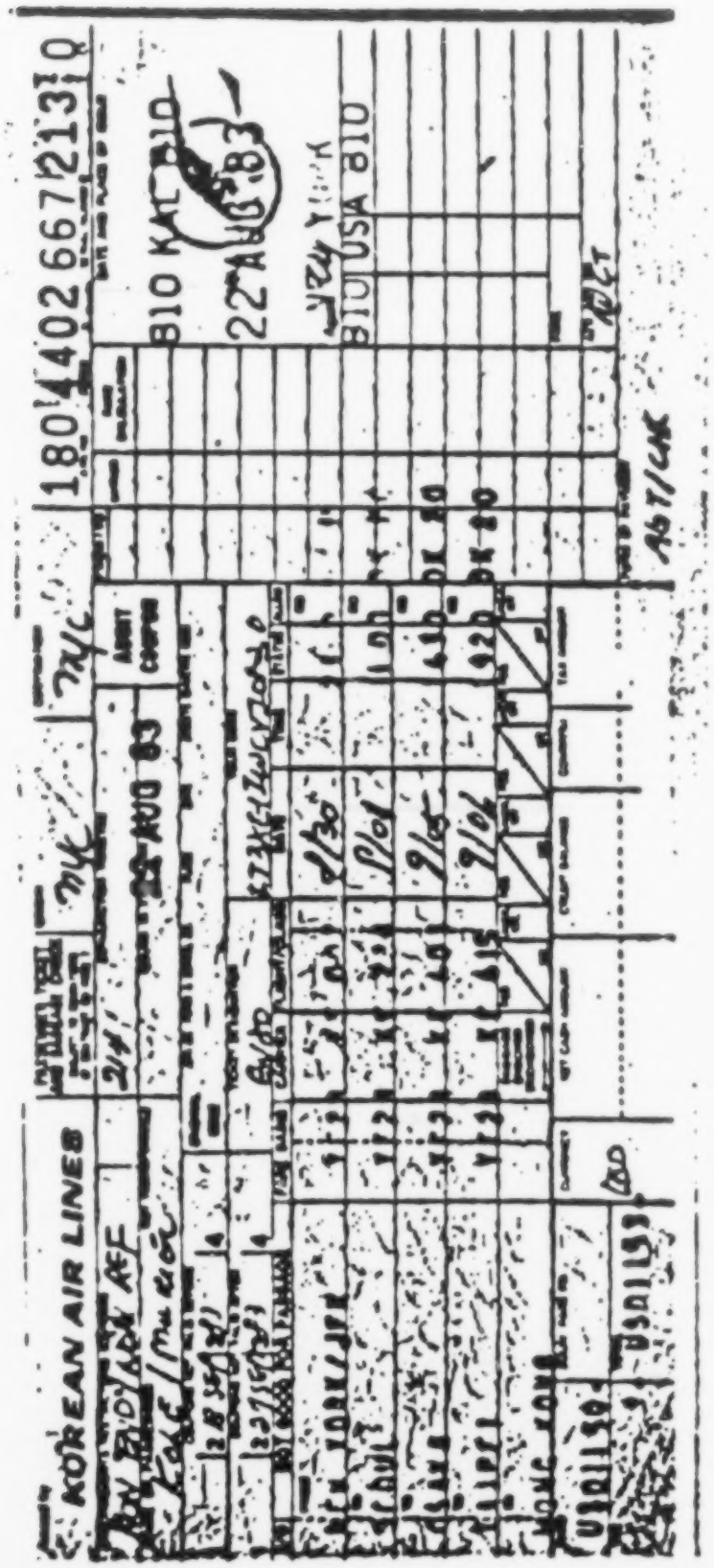
v.

KOREAN AIRLINES, INC., and
THE UNION OF SOVIET SOCIALIST REPUBLICS,

Defendants.

Sample Ticket Booklet No.: 4

[See Opposite →]



83 Civ. 3903
Ticket Booklet No. 4

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MDL Docket No. 565
Misc. No. 83-0345
Civil Action No. 84-0029
D.D.C.

ROBERTA CRUZ, as Personal Representative and Executrix of the Estate of ALFREDO CRUZ, deceased,

Plaintiff,

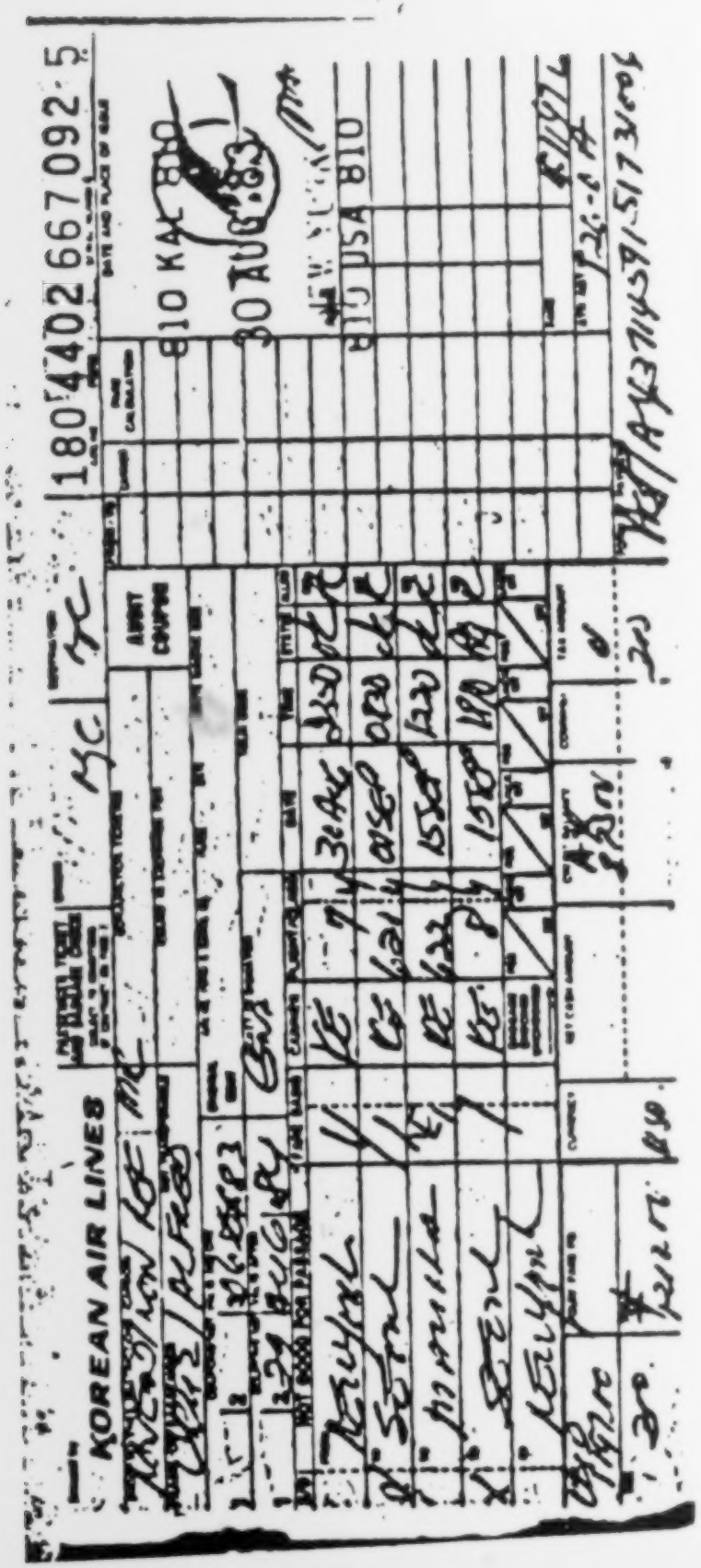
—against—

KOREAN AIR LINES, THE BOEING COMPANY, LITTON INDUSTRIES, INC., and the UNITED STATES,

Defendants.

Sample Ticket Booklet No.: 4

[See Opposite →]



84 Civ. 0133
Sample Ticket Booklet No. 3

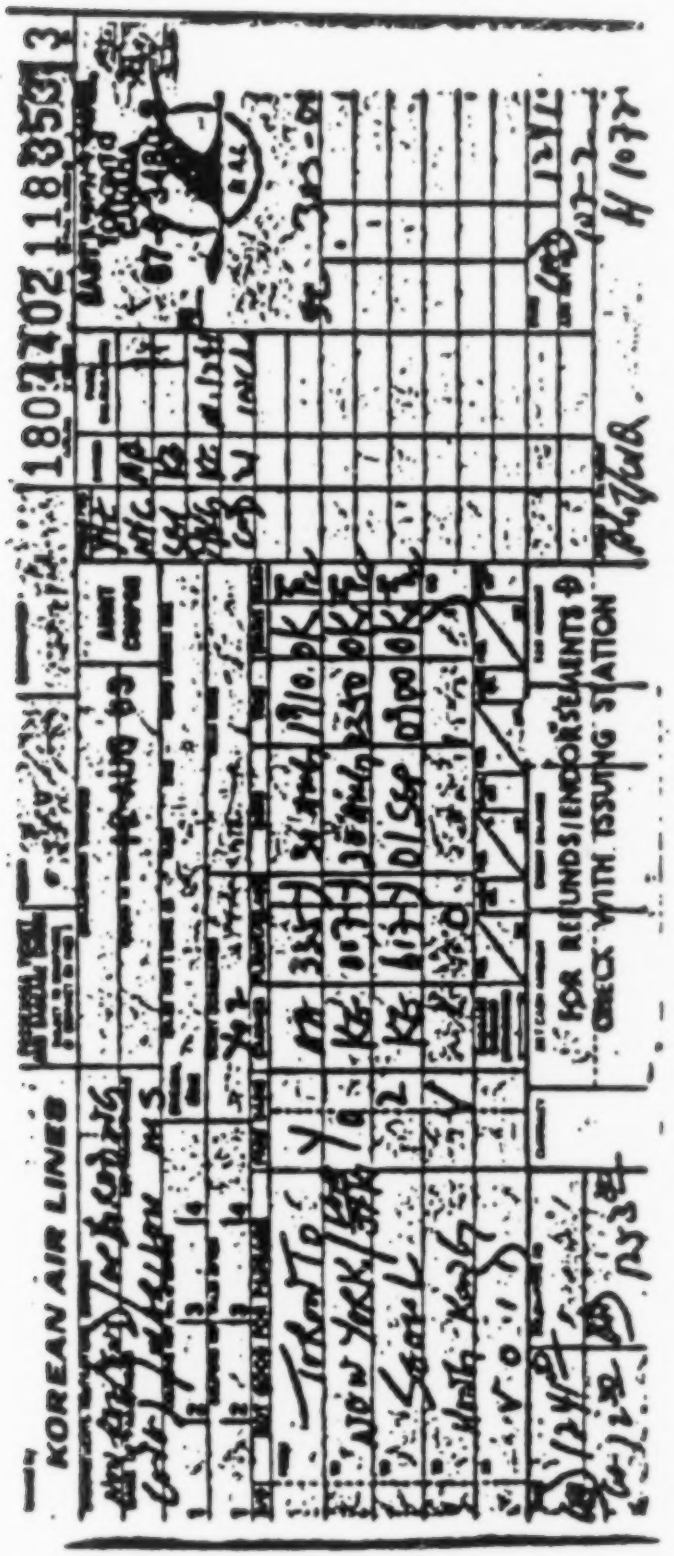


EXHIBIT 4

Sample Ticket Booklet "2"

NOTICE

If the passenger's journey involves an ultimate destination or stop in a country other than the country of departure the Warsaw Convention may be applicable and the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage. See also notices headed "Advice to International Passengers on Limitation of Liability" and "Baggage Liability."

CONDITIONS OF CONTRACT

1. As used in this contract "ticket" means the passenger ticket and baggage check or such one of these documents and the conditions of contract which may be applicable to transportation hereunder. "Carrier" means all carriers that carry or undertake to carry the passenger or his baggage hereunder or perform any other services incidental to such carriage. "WARSAW CONVENTION" means the Convention for the unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on the 12th October 1929 or the Convention as amended at The Hague on 28th September 1955 whichever may be applicable.

2. Carriage hereunder is subject to the rules and limitations relating to liability established by the Warsaw Convention unless such carriage is not "international carriage" as defined by that Convention.

3. To the extent not contrary to the foregoing carriage and other services performed by each carrier are subject to: (i) the conditions contained in this ticket, (ii) applicable tariffs, (iii) carrier's conditions of carriage and other regulations which are made part hereof and are available for inspection at the offices of carrier, except in transportation between a place in the United States or Canada and any place outside thereof to which tariffs in force in those countries apply.

4. Carrier's name may be abbreviated in the ticket, the full name and its abbreviation being set forth in carrier's tariffs, conditions of carriage, regulations or timetables. Carrier's address shall be the airport of departure shown opposite the first abbreviation of carrier's name in the ticket. The agreed stopping places are those places set forth in this ticket or as shown in carrier's timetables as scheduled stopping places on the passenger's route. If carriage to be performed hereunder by several successive carriers is regarded as a single operation.

5. An air carrier issuing a ticket for carriage over the lines of another air carrier does so as agent only.

6. Any exclusion or limitation of liability of carrier shall apply to and be for the benefit of agents, servants and representatives of carrier and any person whose aircraft or other equipment is used by carrier for carriage and its agents, servants and representatives.

7. Checked baggage will be delivered to bearer of the baggage check. In case of damage to baggage moving in international transportation complaint must be made in writing to carrier forthwith after discovery of damage and, at the latest, within 7 days from receipt. In case of delay, complaint must be made within 21 days from date baggage has been delivered. See tariffs or conditions of carriage regarding non-international transportation.

8. This ticket is good for carriage for one year from date of issue except where shorter periods are prescribed by applicable tariffs, conditions of carriage, or regulations. Unless otherwise specified herein, fares for carriage hereunder are subject to change prior to commencement of carriage. Reconfirmation may not be required as a condition of transportation, unless required by applicable tariff, conditions of carriage, or regulations.

9. Carrier undertakes to use its best efforts to carry the passenger and baggage with reasonable dispatch. Times shown in timetables or elsewhere are not guaranteed and do not form part of this contract. Carrier may without notice substitute alternate carriers or aircraft and may alter or omit stopping places shown on the ticket in case of necessity. Schedules are subject to change without notice. Carrier assumes no responsibility for making connections.

10. Passenger shall comply with Government travel requirements, present all documents required by carrier, and arrive at airport by time fixed by carrier or, if no time is fixed, early enough to complete departure procedures.

11. No agent, servant or representative of carrier has authority to alter, modify or waive any provision of this contract.

J.A.74

알 림

旅客의 最終目的地 또는 途中寄港地가 出発国以外의 他国内의 一個 地点일 境遇, 同旅客은 旅客의 死亡 또는 傷害 및 手荷物의 紛失 또는 毁傷에 対한 運送人의 責任을 法的으로 制限하는 "와르소條約"을 適用받을 수 있읍니다. 本航空券에 表示된 "国際旅客에 対한 責任制限에 関한 告知"를 参照하시기 바랍니다.

契 約 條 件

1. 本 契約에서 使用되는 用語의 定義는 다음과 같읍니다. "航空券"이란 本 "旅客航空券 및 手荷物引換 証"을 말하는 것으로서 本 契約條件 및 上記 事項은 本 航空券의 一部를 構成합니다. "運送人"이란 運送을 말하며 運送人 이란 旅客 또는 그의 手荷物을 本契約 條件에 따라 運送하거나 또는 運送을 目的하거나 또는 営業航空運送과 関連되는 其他 서비스를 営하는 모든 航空運送人을 말합니다. "와르소條約"이란 1929年 10月 12日 "와르소"에서 署名된 国際航空運送에 関한 特定 規則의 統一을 위한 條約" 또는 1955年 9月 28日 "헤이그"에서 改正된 와르소條約中 適用되는 條約을 말합니다.

2. 本 契約下의 運送은 와르소條約에 定義된 国際輸送性質을 띠고 그 運送은 同 條約에서 定하고 있는 責任에 関한 制限 및 制約을 받읍니다.

3. 前記事項에 抵触하지 않는 限度에서 本 運送人이, 営하는 運送 및 其他 서비스는 上記한 바와 같이 本 航空券에 記載된 各 運送人의 (i) 本 航空券과 関連된 制限 (ii) 適用되는 運賃, (iii) 運送人의 運送約款 및 其他 規則 (本 航空券의 一部를 構成함)에 따라 行하며 이는 運送人의 営業所에서 閲覧할 수 있읍니다. 但 本 運送人의 営業所에서 閲覧할 수 없읍니다 할지라도 이는 合衆国 또는 카나다 内의 一地点과 合衆国 또는 카나다 以外의 他国内의 一地点과의 運送에 適用되는 運賃 및 카나다에서 発行한 旅行書類가 適用됩니다.

4. 運送人의 名称은 航空券上에 略称으로 表記할 수 있으며 正式名称 및 그 略称은 運送人의 運賃表, 規則 또는 運航時刻表에 記載되어 있읍니다. 運送人의 住所는 航空券上의 運送人의 略号表示 다음에 記載되어있는 出発空港을 말합니다. 旅客과 運送人間의 合意한 運中寄港地는 本 航空券上에 明示된 運中寄港地 또는 旅客의 旅行上에 記載된 運中 運中寄港地로서 運送人은 運賃表에 表示 明示된 運中寄港地는 아닙니다. 本 契約條件下에서 二個 以上의 運送人에 依하여 順次的으로 行하여지는 運送은 單一 運送으로 取扱합니다.

5. 他航空運送人을 代理 使用 上의 運送을 目的으로 航空券을 発行하는 航空運送人은 단지 代理的 航空運送人로 代理人으로서 航空券을 発行하는 것입니다.

6. 運送人의 責任 또는 責任制限에 関한 規定은 運送人의 代理人, 雇傭員 및 代理人 그리고 運送을 爲해 運送人이 使用하는 航空機의 所有者, 그의 代理人, 雇傭員 및 代理人 모두에게 適用됩니다.

7. 登託手荷物은 手荷物票 所持者에게 引渡합니다. 国際運送으로 運送되는 手荷物에 損傷이 発生한 境遇 損傷는 発見即時 発見即時, 또는 遅어도 手荷物을 受取한 날로부터 7日 以內에 運送人에게 書面으로 異議를 提起하여야 합니다. 遅延의 境遇는 手荷物을 受取한 날로부터 21日 以內에 異議를 提起해야 합니다. 国際輸送이 아닌 境遇에는 国內法 또는 運送約款을 參照하시기 바랍니다.

8. 本 航空券 運送人의 代理로 運送約款 또는 国際航空에 適用되 定期한 期間을 除外하고는 本 航空券은 発行日로부터 1年間 有効합니다. 別途明示上의 運送을 除한 運賃은 運送開始前 変更될 수 있읍니다. 特別한 境遇이, 要請되지 않는한 境遇 運送人은 運送을 確認할수 있읍니다.

9. 運送人은 合理的 条件으로 旅客 및 手荷物을 運送하기 爲하여 最善의 努力을 할 義務를 느끼나 運航時刻表 또는 其他의 表示는 時刻은 保証는 것은 아니며 또한 本 契約의 一部를 構成하지도 않읍니다. 運送人은 必要에 依하여도 運送人 또는 航空機를 変更運送人 또는 他航空機로 代替할 수 있으며 또한 出発地 또는 旅行上에 表示한 運中寄港地를 変更하거나 省略할 수 있읍니다. 스케줄도 通告없이 変更될 수 있읍니다. 運送人은 接続運送에 対하여 一切의 責任을 지지 않읍니다.

10. 旅客은 政府가 要한 旅行書類를 準守하여야 하며 航空券의 出示를 要請 및 其他 必要書類를 提示하여 運送人이 指定한 時刻까지 또는 時刻이 指定되지 않았을 境遇는 出発 手続를 完了할 수 있은 充分한 時間的 餘裕를 갖고 空港에 到着하여야 합니다.

11. 運送人의 如何한 代理人, 雇傭員 또는 代表者도 本 契約의 如何한 條文을 変更하거나 修正하거나 또는 抛棄할 権限을 가지지 않읍니다.

J.A.75

ADVICE TO INTERNATIONAL PASSENGERS ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of KOREAN AIR LINES CO., LTD. and certain other carriers parties to such special contracts, for death of or personal injury to passengers is limited in most cases to proven damages not to exceed U.S. $75,000, or its equivalent per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers travelling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to pasengers is limited in most cases to approximately U.S. $10,000 or U.S. $20,000, or its equivalent.

The names of carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information, please consult your airline's insurance company representative.

NOTE: The limit of liability of U.S. $75,000, or its equivalent above is inclusive of Legal Fees and Costs except that in case of a claim brought in a State where provision is made for separate award of Legal Fees and Costs, the limit shall be the sum of U.S. $58,000, or its equivalent exclusive of Legal Fees and Costs.

NOTICE OF BAGGAGE LIABILITY LIMITATIONS

Liability for loss, delay, or damage to baggage is limited as follows unless a higher value is declared in advance and additional charges are paid: (1) for most international travel (including domestic portions of international journeys) to approximately U.S. $9.07 per pound ($20.00 per kilo) for checked baggage and U.S. $400.00 per passenger for unchecked baggage; (2) for travel wholly between U.S.A. points, to U.S. $750.00 per passenger on most carriers (a few have lower limits). Excess valuation may not be declared on certain types of valuable articles. Carriers assume no liability for fragile or perishable articles. Further information may be obtained from the carrier.

J.A.76

國際線 旅客에 対한 責任制限에 関한 告知

旅客이 出発地国 以外의 国家内에 最終目的地 또는 途中着陸地를 둔 旅行을 할 境遇에는, 出発地国 또는 目的地国内의 国内線 全区間을 包含한 全体旅行에 対하여 所謂 와르소條約의 規定이 適用될 수 있읍니다. 同條約 및 有効한 타리프에 明示되어 있는 特別運送契約에 依해서 旅客이 目的地, 出発地 또는 合意된 途中着陸地를 美国内에 둔 旅行을 하는 境遇에, 大韓航空 및 当該特別契約의 当事者인 他運送人이 旅客의 死亡 또는 負傷에 対하여 지는 責任限度는 大部分의 境遇 旅客 1人当 美貨 75,000$ 또는 그 相当額을 超過하지 않는 範囲의 立証된 損害로 制限되며, 同 限度까지의 責任은 運送人側의 過失을 條件으로 하지 않는 것으로 規定되어 있읍니다. 当該特別契約의 当事者가 아닌 運送人에 依하여 旅行하는 旅客의 境遇, 또는 目的地, 出発地 또는 合意된 途中着陸地를 美国内에 두지 않는 旅行을 하는 旅客의 境遇, 旅客의 死亡 또는 負傷에 対한 運送人의 責任은 大部分의 境遇 旅客 1人当 美貨 約 10,000$ 또는 20,000$ 또는 그 相当額으로 制限됩니다. 当該特別契約의 当事者인 運送人의 名称은 当該運送人의 航空券発売事務所에 備置되어 있으며 旅客이 要請할 境遇에는 配置될 수 있읍니다. 個別保険의 加入하므로써 上記 賠償額에 追加하여 賠償을 받을 수 있읍니다. 이 保険은 와르소條約 또는 当該特別運送契約上의 運送人의 責任限度에 依하여 影響을 받지 않읍니다. 仔細한 것은 搭乗航空社 또는 保険会社의 職員과 相談하여 주시기 바랍니다.

註 : 上記의 責任限度額 美貨 75,000$또는 그 相当額은 訴訟費用 및 弁護士 報酬를 包含한 金額입니다. 但 訴訟費用 및 弁護士 報酬를 別途로 規定하는 国家에서 提起된 賠償請求의 境遇 그 限度額은 訴訟費用 및 弁護士 報酬를 除外한 美貨 58,000$ 또는 그 相当額입니다.

J.A.77

手荷物 賠償 責任 限度

旅客이 도다 높은 価格을 事前에 申告하고 그에 따른 追加料金을 支拂하지 않는 限, 手荷物의 紛失, 遅延 또는 損傷에 対한 航空社의 責任限度額은 다음과 같읍니다.

(1) 大部分의 国際線旅行 国際線旅行의 一部을 構成하는 国内線 旅行区間을 包含한 에 対해서는, 委託手荷物의 境遇 1킬로그람当 美貨 20$ 1파운드当 美貨 9.07$ 船舶託手荷物 旅客이 客室内로 持入하는 手荷物 의 境遇 旅客 1人当 美貨 400$

(2) 美国内의 純粋들 旅行에 対해서는 大部分의 航空社의 境遇 旅客 1人当 美貨 750$ 責任限度가 이보다 낮은 航空社도 있읍. 어떤 種類의 高価品는 에 対하서는 限度額을 超過하는 価格을 申告할 수 있읍니다. 航空社는 破損 또는 腐敗되기 쉬운 品目에 対해서는 責任을 지지 않읍니다. 仔細한 것은 当該 航空社에 問議하시기 바랍니다.

註 : 上記의 '어떤 種類의 高価品'은 貨幣, 宝石類, 金銀製品, 時計類, 毛皮, 또는 電子機器를 말합니다.

本 航空券上에 表記된 한줄 通知文은 当社의 運送約款에서 発生 또는 関連한 内容으로 国際的 解釈上 異見이 있을 時에는 当社의 運送約款을 基本으로합니다.

RETURN & ONWARD RESERVATIONS

IF YOU BREAK YOUR JOURNEY FOR MORE THAN 72 HOURS AT ANY POINT, PLEASE RECONFIRM YOUR INTENTION OF USING YOUR CONTINUING OR RETURN RESERVATION.
TO DO SO, PLEASE INFORM THE AIRLINE OFFICE AT THE POINT WHERE YOU INTEND TO RESUME YOUR JOURNEY AT LEAST 72 HOURS BEFORE DEPARTURE OF YOUR FLIGHT.
FAILURE TO RECONFIRM WILL RESULT IN THE CANCELLATION OF YOUR RESERVATION(S).
IF YOUR JOURNEY IS WHOLLY WITHIN EUROPE THIS NOTICE DOES NOT APPLY TO YOU.

TICKET RESTRICTION

Certain fares (mostly discounted fares for excursion, group, inclusive tour, Budget or Apex) restrict the validity of your tickets, the dates of your journeys or voluntary changes of routing. When in doubt, please check with your booking office.

APPLICATION FOR REFUND

Application for refund should be made during the period of validity of the ticket, exchange order or miscellaneous charges order, and Korean Air Lines Co., Ltd. reserves the right to refuse refund when application therefor is made more than thirty (30) days after expiration date of the ticket, exchange order or miscellaneous charges order.

DANGEROUS ARTICLES

It is dangerous and therefore forbidden to take any of those articles as listed below in passenger's baggage, either checked or unchecked.

Explosives, Compressed gases, Flammable liquids and solids (including matches or lighter fuel in large quantities), Corrosives, Radioactive materials, Magnetized materials, Offensive or irritating substances and other articles liable to damage aircraft, persons and properties loaded.

Firearms, swords and other similar items should not be carried in cabin. Further information is available on request.

COUPON SEQUENCE

Flight coupons must be used in sequence from the place of departure as shown on the passenger's coupon.

J.A.78

復便 또는 接続航空便의 予約 再確認 (매우 重要합니다)

貴下의 目的地 또는 途中滯留地에서 72時間(3日)以上 滯留할 境遇에는, 予約된 航空便의 出発 72時間前까지 貴下의 復便 또는 継続 旅行할 航空便의 予約을 반드시 再確認하여 주시기 바랍니다.

旅行을 다시 開作하고자 하는 都市에 있는 利用航空社 営業所에 直接 가시거나 또는 電話, 電報等으로 予約을 再確認하여도 無妨합니다. 만약 予約을 再確認하지 않을 境遇에는 航空社 任意로 貴下의 予約을 取消할 것임으로 이 点에 留意하여 주시기 바랍니다. 유럽内에서만 旅行하시는 境遇에는 予約의 再確認이 必要없읍니다만 上記와 같은 方法으로 再確認할 것을 勧하는 바입니다.

航空券 制限 事項

어떤 運賃 大部分 割引된 運賃임)을 支拂한 航空券은 그 有効期間, 貴下의 旅行日程 또는 自発的인 経路変更等이 制限되어 있읍니다.

還 拂 申 請

還拂申請은 航空券 또는 MCO(Miscellaneous Charge Order)의 有効期間中에 하셔야 합니다. 航空券 또는 MCO의 有効期間 満了後 30日 以上이 経過한 後에 還拂을 申請할 境遇, 大韓航空은 還拂을 拒絶할 権利를 가집니다.

危險品目 機內 持入 禁止

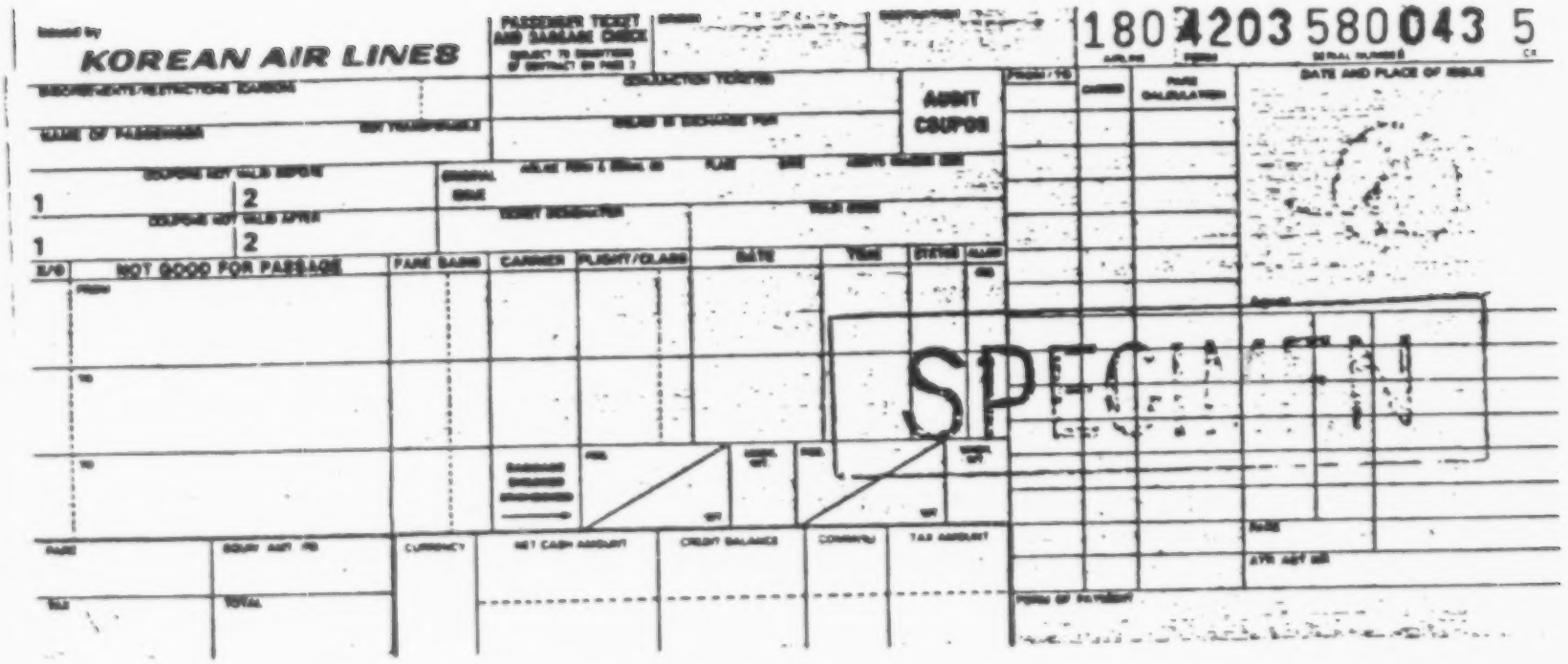
下記 品目은 危險品目이므로 旅客의 手荷物 委託手荷物이든 非委託手荷物이든)内에 넣어 機内 持入이 禁止되어 있읍니다.

爆発物, 圧縮까스, 引火性物質(多量의 성냥 또는 라이타기름 包含), 腐蝕性物質, 放射性物質, 磁気性物質, 機客에게 不快感을 주는 物質, 그리고 航空機, 機客, 機務員 및 搭載財産에 損傷을 주기 쉬운 其他 物質, 銃砲, 刀劍 및 其他 類似品目들은 客室内에 持参할 수 없읍니다. 仔細한 것은 航空社에 問議하여 주십시요.

搭乘 쿠폰 使用 順序

搭乗用 쿠폰은 旅客用 쿠폰에 記載되어 있는대로 出発地부터 順序에 따라 使用하셔야 합니다.

J.A.79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PASSENGER TICKET AND BAGGAGE CHECK
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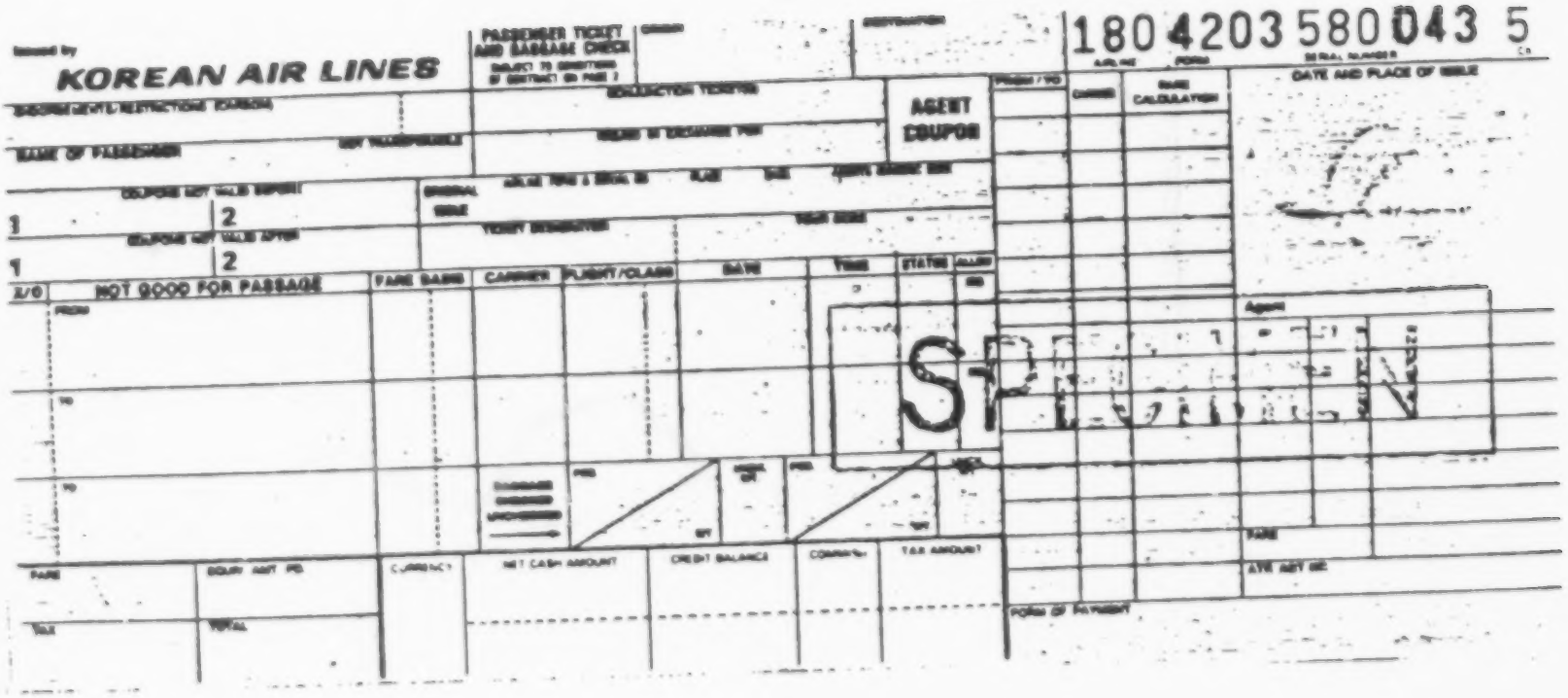
J.A.80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KOREAN AIR LINES
PASSENGER TICKET AND BAGGAGE CHECK
1804203580043 5
AGENT COUPON
1
2
1
2
NOT GOOD FOR PASSAGE
SPECIMEN

J.A.81

KOREAN AIR LINES

PASSENGER TICKET AND BAGGAGE CHECK

180 4203580043 2

FLIGHT COUPON 1

180 4203580043 2

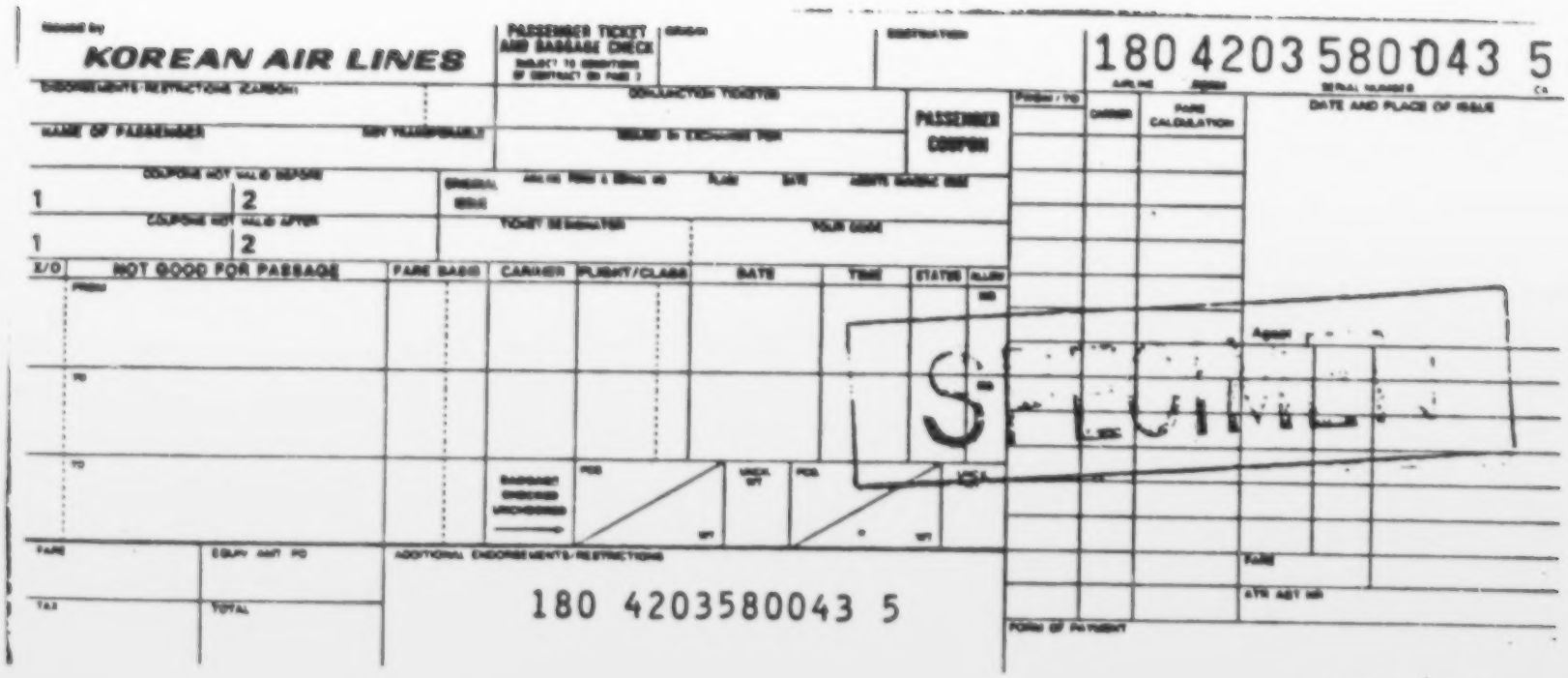
KOREAN AIR LINES

PASSENGER TICKET AND BAGGAGE CHECK

180 4203580043

FLIGHT COUPON 2

180 4203580043 6



J.A.84

Sample Ticket Booklet "3"

J.A.85

NOTICE

[illegible] ultimate destination or stop in a country other than the country of departure the Warsaw Convention may [illegible] and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage [illegible] applies. Advice to International Passengers on Limitation of Liability" and "Baggage Liability."

CONDITIONS OF CONTRACT

[illegible] means the passenger ticket and baggage check [illegible] carriage [illegible] transportation [illegible] to carry the passenger on the [illegible] to such carriage. "WARSAW [illegible] Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 or that Convention as amended [illegible] to the extent [illegible] to be applicable.

2 Carriage and other services performed by each carrier are subject to rules and limitations relating to liability established by the Warsaw Convention unless such carriage is not "international carriage" as defined by that Convention.

3 To the extent not in conflict herewith, the foregoing carriage and other services performed by each carrier are subject to all applicable tariffs, rules, regulations and conditions of carriage [illegible] carrier except in transportation between [illegible] and any place outside thereof to which tariffs in [illegible]

4 Carrier is authorized to issue, in connection with carriage, [illegible] if the ticket, the full name and its abbreviation [illegible] terminations of carriage regulations or timetables, carrier's [illegible] opposite the first abbreviation of carrier's [illegible] agreed stopping places are those places set forth in this ticket or as [illegible] carrier for stopping places on the passenger's route. [illegible] successive carriers is regarded as a single [illegible]

5 [illegible] the lines of another air carrier does so

6 Any exclusion or limitation of liability of carrier shall apply to and be for the benefit of agents, servants and representatives of carrier and any person whose aircraft is used by carrier for carriage and its agents, servants and representatives [illegible]

7 Checked baggage will be delivered to bearer of the baggage check. In case of damage to baggage moving in international transportation, complaint must be made in writing to carrier forthwith after discovery of damage and, at the latest, within 7 days from receipt; in case of delay, complaint must be made within 21 days from date the baggage was delivered. See tariffs or conditions of carriage regarding nonperformance, [illegible] transportation.

8 This ticket is good for carriage for one year from date of issue except as otherwise provided in this ticket, in carrier's tariffs, conditions of carriage or related regulations. The fare for carriage hereunder is subject to change prior to commencement of carriage. Carrier may refuse transportation if the applicable fare has not been paid.

9 Carrier undertakes to use its best efforts to carry the passenger and baggage with reasonable dispatch. Times shown in timetables or elsewhere are not guaranteed and form no part of this contract. Carrier may without notice substitute alternate carriers or aircraft and may alter or omit stopping places shown on the ticket. In case of necessity, carrier is authorized to make any [illegible] subject to change without notice. Carrier assumes no responsibility for making connections.

10 Passenger shall comply with Government travel requirements, present any passport, visa or other required documents and arrive at airport by the time fixed by carrier or, if no time is fixed, early enough to complete departure procedures.

11 No agent, servant or representative of carrier has authority to alter, modify or waive any provision of this contract.

J.A.86

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알 림

[illegible] 또는 [illegible] 出発国以外의 他国内의 一箇所 또는 寄港地를 国際旅客은 旅客의 死亡 또는 傷害 및 手荷物의 紛失 또는 破損에 対한 [illegible] 責任을 制限하는 것으로 制限하는 "国際線旅客에 対한 責任制限에 関한 告知 를 参照하시기 바랍니다. 本航空券에 明記된 "国際線旅客에 対한 責任制限에 関한 告知" 를 適用한 수 있읍니다.

契 約 條 件

1 [illegible] 旅客의 航空券 및 手荷物 引換証 [illegible] 運送 [illegible] 運送 [illegible] 運送

ADVICE TO INTERNATIONAL PASSENGERS ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of KOREAN AIR LINES CO., LTD. and certain other carriers parties to such special contracts for death of or personal injury to passengers is limited in most cases to proven damages not to exceed U.S. $75,000, or its equivalent per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers travelling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to pasengers is limited in most cases to approximately U.S. $10,000 or U.S. $20,000, or its equivalent.

The names of carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information, please consult your airline or insurance company representative.

NOTE: The limit of liability of U.S. $75,000 or its equivalent above is inclusive of Legal Fees and Costs except that in case of a claim brought in a State where provision is made for separate award of Legal Fees and Costs, the limit shall be the sum of U.S. $58,000, or its equivalent exclusive of Legal Fees and Costs.

NOTICE OF BAGGAGE LIABILITY LIMITATIONS

Liability for loss, delay, or damage to baggage is limited as follows unless a higher value is declared in advance and additional charges are paid: (1) for most international travel (including domestic portions of international journeys) to approximately U.S. $9.07 per pound ($20.00 per kilo) for checked baggage and U.S. $400.00 per passenger for unchecked baggage; (2) for travel wholly between U.S.A. points, to U.S. $750.00 per passenger on most carriers (a few have lower limits). Excess valuation may not be declared on certain types of valuable articles. Carriers assume no liability for fragile or perishable articles. Further information may be obtained from the carrier.

J.A.88

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國際線 旅客의 對한 責任制限에 關한 告知

J.A.89

RETURN & ONWARD RESERVATIONS

IF YOU BREAK YOUR JOURNEY FOR MORE THAN 72 HOURS AT ANY POINT, PLEASE RECONFIRM YOUR INTENTION OF USING YOUR CONTINUING OR RETURN RESERVATION

TO DO SO, PLEASE INFORM THE AIRLINE OFFICE AT THE POINT WHERE YOU INTEND TO RESUME YOUR JOURNEY AT LEAST 72 HOURS BEFORE DEPARTURE OF YOUR FLIGHT

FAILURE TO RECONFIRM WILL RESULT IN THE CANCELLATION OF YOUR RESERVATION(S)

IF YOUR JOURNEY IS WHOLLY WITHIN EUROPE THIS NOTICE DOES NOT APPLY TO YOU

NOT ALL AIRLINES REQUIRE RECONFIRMATION

TICKET RESTRICTION

Certain fares (mostly discounted fares for excursion, group, inclusive tour, Budget or Apex) restrict the validity of your tickets, the dates of your journeys or voluntary changes of routing. When in doubt, please check with your booking office.

APPLICATION FOR REFUND

Application for refund should be made during the period of validity of the ticket, exchange order or miscellaneous charges order, and Korean Air Lines Co. Ltd. reserves the right to refuse refund when application therefor is made more than thirty (30) days after expiration date of the ticket, exchange order or miscellaneous charges order.

DANGEROUS ARTICLES

It is dangerous and therefore forbidden to take any of those articles as listed below in passenger's baggage, either checked or unchecked.

Explosives, Compressed gases, Flammable liquids and solids (including matches or lighter fuel in large quantities), Corrosives, Radioactive materials, Magnetized materials, Offensive or irritating substances and other articles liable to damage aircraft, persons and properties loaded.

Firearms, swords and other similar items should not be carried in cabin. Further information is available on request.

COUPON SEQUENCE

Flight coupons must be used in sequence from the place of departure as shown on the passenger's coupon.

J.A.90

復便 또는 接続航空便의 予約 再確認 (매우 重要합니다)

貴下의 目的地 또는 途中滞留地에서 72時間(3日)以上 滞留할 境遇에는 予約된 航空便의 出発 72時間前까지 貴下의 復便 또는 継続 旅行할 航空便의 予約을 반드시 再確認하여 주시기 바랍니다.

旅行을 다시 開作하고자 하는 都市에 있는 利用航空社 営業所에 直接 가시거나 또는 電話, 電報等으로 予約을 再確認하여도 無妨합니다. 만약 予約을 再確認하지 않을 境遇에는 航空社 任意로 貴下의 予約을 取消할 것임으로 이 点에 留意하여 주시기 바랍니다. 유럽内에서만 旅行하시는 境遇에는 予約의 再確認이 必要없읍니다만 上記와 같은 方法으로 再確認할 것을 勧하는 바입니다.

다른 모든 航空社도 이 規定을 꼭 適用하는 것은 아닙니다.

航空券 制限 事項

어떤 運賃 大部分 割引된 運賃임)을 直接한 航空券은 그 有効期間, 貴下의 旅行日程 또는 自意的인 経路変更等이 制限되어 있읍니다.

還 拂 申 請

還拂申請은 航空券 또는 MCO(Miscellaneous Charge Order)의 有効期間中에 하셔야 합니다. 航空券 또는 MCO의 有効期間 満了後 30日 以上이 経過한 後에 還拂을 申請할 境遇, 大韓航空은 還拂을 拒絶할 権利를 가집니다.

危險品目 機内 持入 禁止

下記 品目은 危險品目이므로 旅客의 手荷物(委託手荷物이든 非委託手荷物이든)内에 넣어 機内 持入이 禁止되어 있읍니다.

爆発物, 圧縮가스, 引火性物質(多量의 성냥 또는 라이타기름 包含), 腐蝕性物質, 放射性物質, 磁気性物質, 旅客에게 不快感을 주는 物質, 그리고 航空機, 乗客, 乗務員 및 搭載財産에 損傷을 주기 쉬운 其他 物質, 銃砲, 刀剣 및 其他 類似品目들은 客室内에 持参할 수 없읍니다 仔細한 것은 航空社에 問議하여 주십시요.

搭乘 쿠폰 使用 順序

搭乗用 쿠폰은 旅客用 쿠폰에 記載되어 있는대로 出発地부터 順序에 따라 使用하셔야 합니다.

J.A.91

Issued by

KOREAN AIR LINES

PASSENGER TICKET AND BAGGAGE CHECK

SUBJECT TO CONDITIONS OF CONTRACT ON PAGE 1

ORIGIN

DESTINATION

180 4402 568030 0

AIRLINE CODE | FORM CODE | SERIAL NUMBER | CK

ENDORSEMENTS/RESTRICTIONS (CARRIER)

NAME OF PASSENGER

NOT TRANSFERABLE

CONJUNCTION TICKET(S)

ISSUED IN EXCHANGE FOR

AGENT COUPON

FROM / TO

CARRIER

FARE CALCULATION

DATE AND PLACE OF ISSUE

COUPONS NOT VALID BEFORE

1 | 2 | 3 | 4

ORIGINAL ISSUE

AIRLINE CODE NUMBER & SERIAL NO. | PLACE | DATE | AGENTS NUMERIC CODE

COUPONS NOT VALID AFTER

1 | 2 | 3 | 4

TICKET DESIGNATOR | FOR USE

S/O | NOT GOOD FOR PASSAGE | FARE BASIS | CARRIER | FLIGHT/CLASS | DATE | TIME | STATUS | ALLOW

FROM

TO

TO

TO

TO

BAGGAGE CHECKED WITH/WHEN

FREE | WEIGHT/PCS | FREE | WEIGHT/PCS | FREE | WEIGHT/PCS | FREE | WEIGHT/PCS

PCS WT | PCS WT | PCS WT | PCS WT

FARE

EQUIV FARE PD

CURRENCY

NET CASH AMOUNT

CREDIT BALANCE

COMMISSION

TAX AMOUNT

Agent

TAX

TOTAL

FARE

ATB ABT OR

FORM OF PAYMENT

J.A.92

Issued by

KOREAN AIR LINES

PASSENGER TICKET AND BAGGAGE CHECK

SUBJECT TO CONDITIONS OF CONTRACT ON PAGE 1

ORIGIN

DESTINATION

180 4402 568030 0

AIRLINE CODE | FORM CODE | SERIAL NUMBER | CK

ENDORSEMENTS/RESTRICTIONS (CARRIER)

NAME OF PASSENGER

NOT TRANSFERABLE

CONJUNCTION TICKET(S)

ISSUED IN EXCHANGE FOR

AGENT COUPON

FROM / TO

CARRIER

FARE CALCULATION

DATE AND PLACE OF ISSUE

COUPONS NOT VALID BEFORE

1 | 2 | 3 | 4

ORIGINAL ISSUE

AIRLINE CODE NUMBER & SERIAL NO. | PLACE | DATE | AGENTS NUMERIC CODE

COUPONS NOT VALID AFTER

1 | 2 | 3 | 4

TICKET DESIGNATOR | FOR USE

S/O | NOT GOOD FOR PASSAGE | FARE BASIS | CARRIER | FLIGHT/CLASS | DATE | TIME | STATUS | ALLOW

FROM

TO

TO

TO

TO

BAGGAGE CHECKED WITH/WHEN

FREE | WEIGHT/PCS | FREE | WEIGHT/PCS | FREE | WEIGHT/PCS | FREE | WEIGHT/PCS

PCS WT | PCS WT | PCS WT | PCS WT

FARE

EQUIV FARE PD

CURRENCY

NET CASH AMOUNT

CREDIT BALANCE

COMMISSION

TAX AMOUNT

Agent

TAX

TOTAL

FARE

ATB ABT OR

FORM OF PAYMENT

J.A.93

KOREAN AIR LINES

PASSENGER TICKET AND BAGGAGE CHECK

180 4402568030 4

FLIGHT COUPON 1

180 4402568030 4

J.A.94

KOREAN AIR LINES

PASSENGER TICKET AND BAGGAGE CHECK

180 4402568030 1

FLIGHT COUPON 2

180 4402568030 1

J.A.95

Issued by

KOREAN AIR LINES

PASSENGER TICKET AND BAGGAGE CHECK

180 4402568030 5

FLIGHT COUPON 3

180 4402568030 5

J.A.96

Issued by

KOREAN AIR LINES

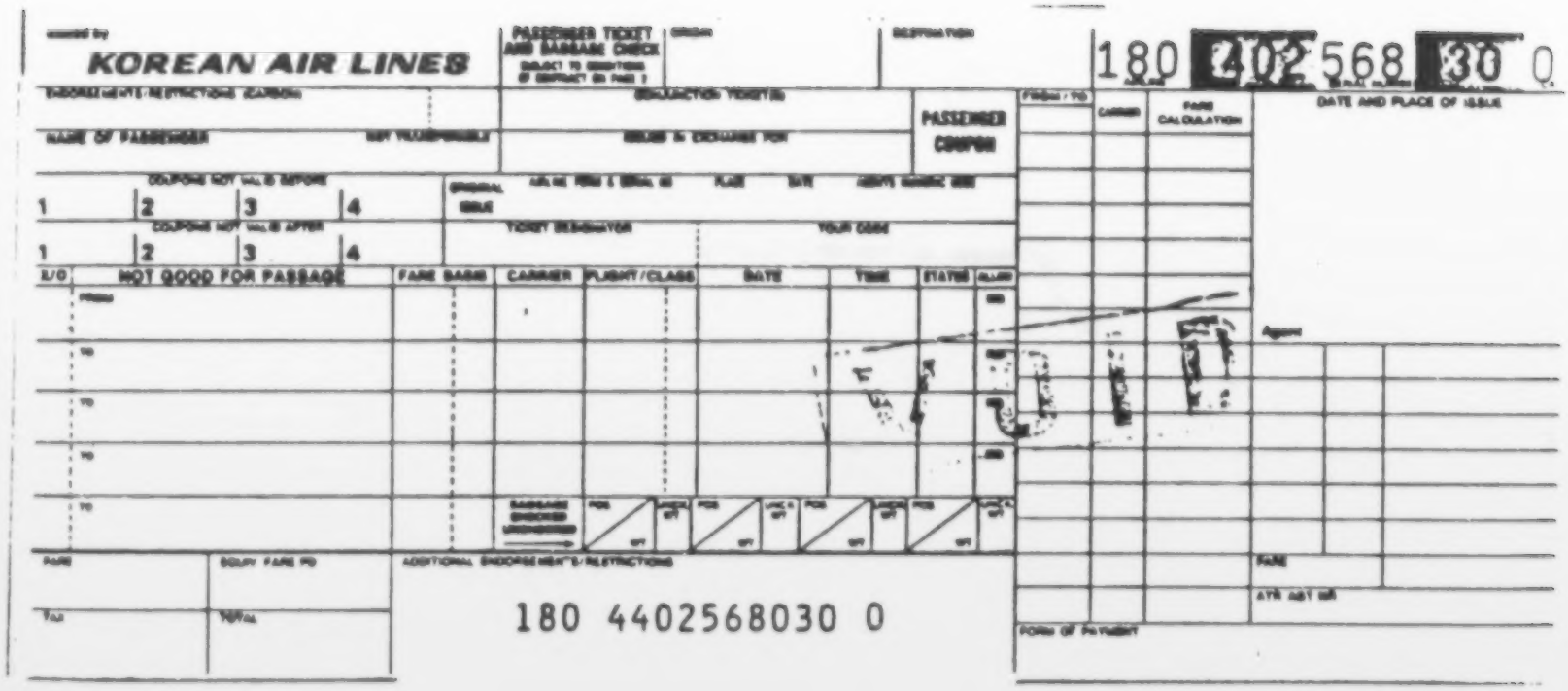
PASSENGER TICKET AND BAGGAGE CHECK

180 4402568030 2

FLIGHT COUPON 4

180 4402568030 2

J.A.97



J.A.98

Sample Ticket Booklet "4"

J.A.99

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NOTICE

[illegible] an ultimate destination or stop in a country other than the country of departure the Warsaw Convention may be [illegible] and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage. [illegible] Advice to International Passengers on Limitation of Liability and Baggage [illegible]

CONDITIONS OF CONTRACT

[illegible]

입 림

[illegible]

契 約 條 件

[illegible]

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ADVICE TO INTERNATIONAL PASSENGERS ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and specific contracts of carriage embodied in applicable tariffs provide that the liability of KOREAN AIR LINES CO., LTD. and certain other carriers parties to such special contracts for death of or personal injury to passengers is limited in most cases to proven damages not to exceed U.S. $75,000 or its equivalent per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers traveling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to pasengers is limited in most cases to approximately U.S. $10,000 or U.S. $20,000, or its equivalent.

The names of carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information, please consult your airline or insurance company representative.

NOTE: The limit of liability of U.S. $75,000 or its equivalent above is inclusive of Legal Fees and Costs except that in case of a claim brought in a State where provision is made for separate award of Legal Fees and Costs, the limit shall be the sum of U.S. $58,000, or its equivalent exclusive of Legal Fees and Costs.

NOTICE OF BAGGAGE LIABILITY LIMITATIONS

Liability for loss, delay, or damage to baggage is limited as follows unless a higher value is declared in advance and additional charges are paid: (1) for most international travel (including domestic portions of international journeys) to approximately U.S. $9.07 per pound ($20.00 per kilo) for checked baggage and U.S. $400.00 per passenger for unchecked baggage; (2) for travel wholly between U.S.A. points, to U.S. $750.00 per passenger on most carriers (a few have lower limits). Excess valuation may not be declared on certain types of valuable articles. Carriers assume no liability for fragile or perishable articles. Further information may be obtained from the carrier.

J.A.102

國際線 旅客에 対한 責任制限에 関한 告知

旅客의 一部終点 또는 停留地가 出発地 또는 目的地国内의 国内線 全区間을 포함한 全行程에 対하여도 適用됩니다. 例를 들면 国内線 区間만을 포함한 旅行을 할 境遇에는, 出発地国 또는 目的地国内의 国内線 全区間을 포함한 全行程에 対하여도 適用됩니다. 国際条約 및 特定한 契約에 明示되어 있는 特別運送契約에 依해서 旅客이 目的地 出発地 또는 合意된 途中着陸地点 등을 가는 旅行을 하는 境遇에, 大韓航空 및 運航特別契約의 当事者인 他運送人이 旅客의 死亡 또는 負傷에 対하여 지는 責任限度는 大部分의 境遇 旅客 1人当 約 75,000$ 또는 그 相当金額을 超過하지 않는 範囲의 立証된 損害로 制限되며 同 限度까지의 責任은 運送人側의 過失을 要件으로 하지 않는 것으로 規定되어 있읍니다. 運航特別契約의 当事者가 아닌 運送人에 依하여 旅行하는 旅客의 境遇, 또는 目的地, 出発地 또는 合意된 途中着陸地点을 美国内에 두지 않는 旅行을 하는 旅客의 境遇, 旅客의 死亡 또는 負傷에 対한 運送人의 責任은 大部分의 境遇 旅客 1人当 約 10,000$ 또는 20,000$ 또는 그 相当額으로 制限됩니다. 運航特別契約의 当事者인 運送人의 名称은 運送人의 航空券発売事務所에 備置되어 있으며 旅客이 要請할 境遇에는 閲覧할 수 있읍니다. 個別的인 保険에 加入하므로서 上記 制限額이 適用하여 補償을 받을 수 있읍니다. 이 保険은 私企業에 依하므로 運航特別運送契約上의 運送人은 責任制限에 関係없이 保険에 加入하여 주시기 바랍니다.

注: 上記의 責任限度額 約 75,000$ 또는 그 相当額은 訴訟費用 및 弁護士 報酬를 포함한 金額입니다. 但 訴訟費用 및 弁護士 報酬를 別途로 規定하는 国家에서 提起된 訴訟의 境遇에는 訴訟費用 및 弁護士 報酬를 除外한 金額 56,000$ 또는 그 相当額입니다.

手荷物 賠償 責任 限度

旅客이 또다 들은 손해를 통知 또는 배상하고 그에 따른 追加요금을 포함하지 않는 限, 手荷物의 紛失, 遅延 또는 損傷에 対한 航空社의 責任限度額은 다음과 같읍니다.

(1) 모든 국제 運送(航空社 連絡運送이나 一部를 構成하는 国内線 旅行区間을 포함함)에 対해서는, 委託手荷物의 境遇 1킬로그람当 金額 20$ 1파운드当 金額 9.07$ 또는 旅客1人当 金額 400$ (託送手荷物 旅客이 携帯하는 手荷物도 포함)

(2) 美国内만 運送을 하는 旅行에 対해서는 大部分의 航空社의 境遇, 旅客 1人当 金額 750$ 責任限度가 이보다 높은 航空社도 있음. 어떤 種類의 物品에 対해서는 限度額을 超過하는 評価를 받을 수 없읍니다. 航空社는 破損 또는 腐敗되기 쉬운 品目에 対해서는 責任을 지지 않읍니다. 仔細한 것은 当該 航空社에 問合하시기 바랍니다.

注: 上記의 一般的 制限사항은 宝石類, 金銀製品, 現金, 旅券 또는 重要書類를 包含합니다.

本 航空券上에 明記한 한국 運送文은 当社와 運送契約을 締結 또는 証明한 内容으로 法律的 解釈上 異見이 있을 時에는 当社의 運送約款을 基本으로합니다.

J.A.103

RETURN & ONWARD RESERVATIONS

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IF YOUR JOURNEY IS WHOLLY WITHIN EUROPE THIS NOTICE DOES NOT APPLY TO YOU

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Firearms, swords and other similar items should not be carried in cabin. Further information is available on request.

COUPON SEQUENCE

Flight coupons must be used in sequence from the place of departure as shown on the passenger's coupon.

J.A.104

復便 또는 接続航空便의 予約 再確認 (매우 重要합니다)

貴下의 目的地 또는 途中滞留地에서 72時間(3日)以上 滞留할 境遇에는, 予約된 航空便의 出発 72時間前까지 貴下의 復便 또는 継続 旅行할 航空便의 予約을 반드시 再確認하여 주시기 바랍니다.

旅行을 다시 継続하고자 하는 都市에 있는 利用航空社 営業所에 直接 가시거나 또는 電話, 電報等으로 予約을 再確認하여도 無妨합니다. 만약 予約을 再確認하지 않을 境遇에는 航空社 任意로 貴下의 予約을 取消할 것임으로 이 点에 留意하여 주시기 바랍니다. 유럽内에서만 旅行하시는 境遇에는 予約의 再確認이 必要없읍니다만 上記와 같은 方法으로 再確認할 것을 勧하는 바입니다.

다른 모든 航空社도 이 規定을 꼭 適用하는 것은 아닙니다.

航空券 制限 事項

어떤 運賃 大部分 割引된 運賃임 을 支拂한 航空券은 그 有効期間, 貴下의 旅行日程 또는 自発的인 経路変更等이 制限되어 있읍니다.

還 拂 申 請

還拂申請은 航空券 또는 MCO(Miscellaneous Charge Order)의 有効期間中에 하셔야 합니다. 航空券 또는 MCO의 有効期間 満了後 30日 以上이 経過한 後에 還拂을 申請할 境遇, 大韓航空은 還拂을 拒絶할 権利를 가집니다.

危険品目 機内 持入 禁止

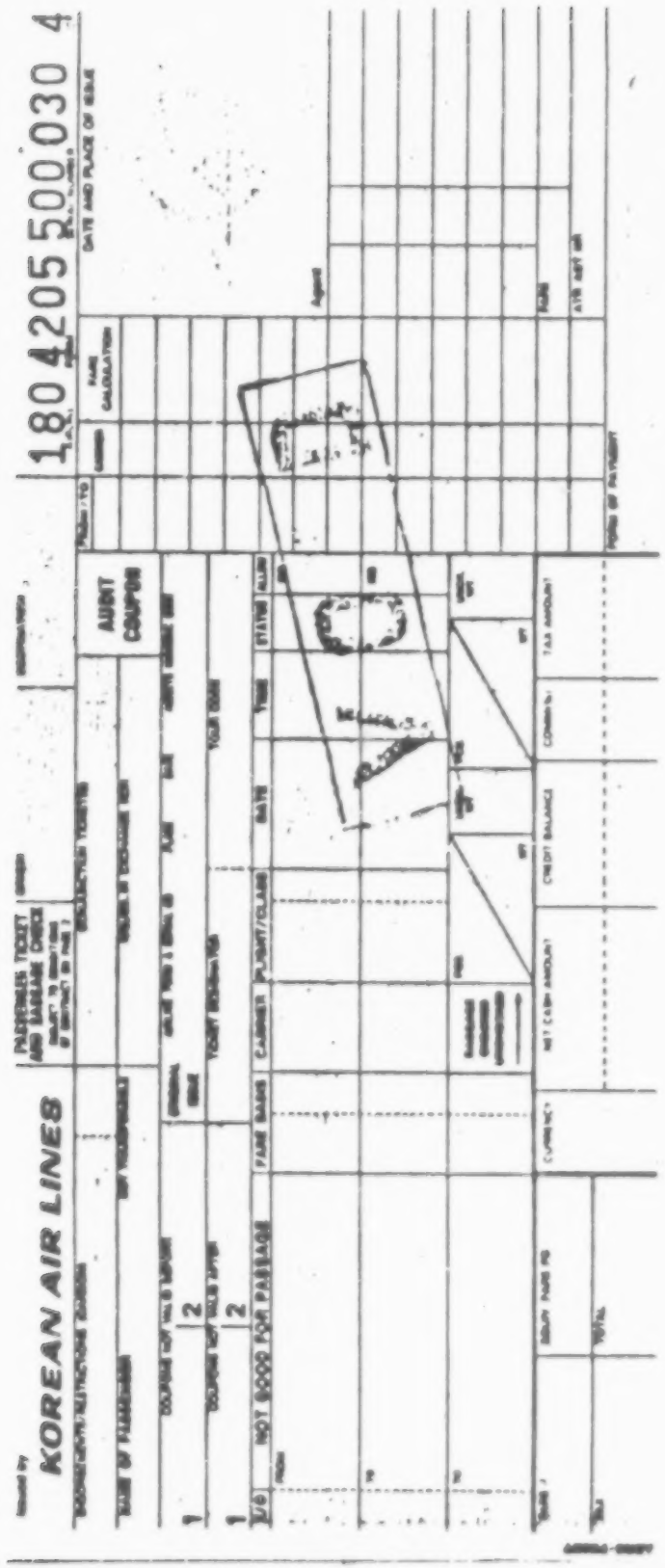
下記 品目은 危険品目이므로 旅客의 手荷物(委託手荷物이든 非委託手荷物이든)内에 넣어 機内 持入이 禁止되어 있읍니다.

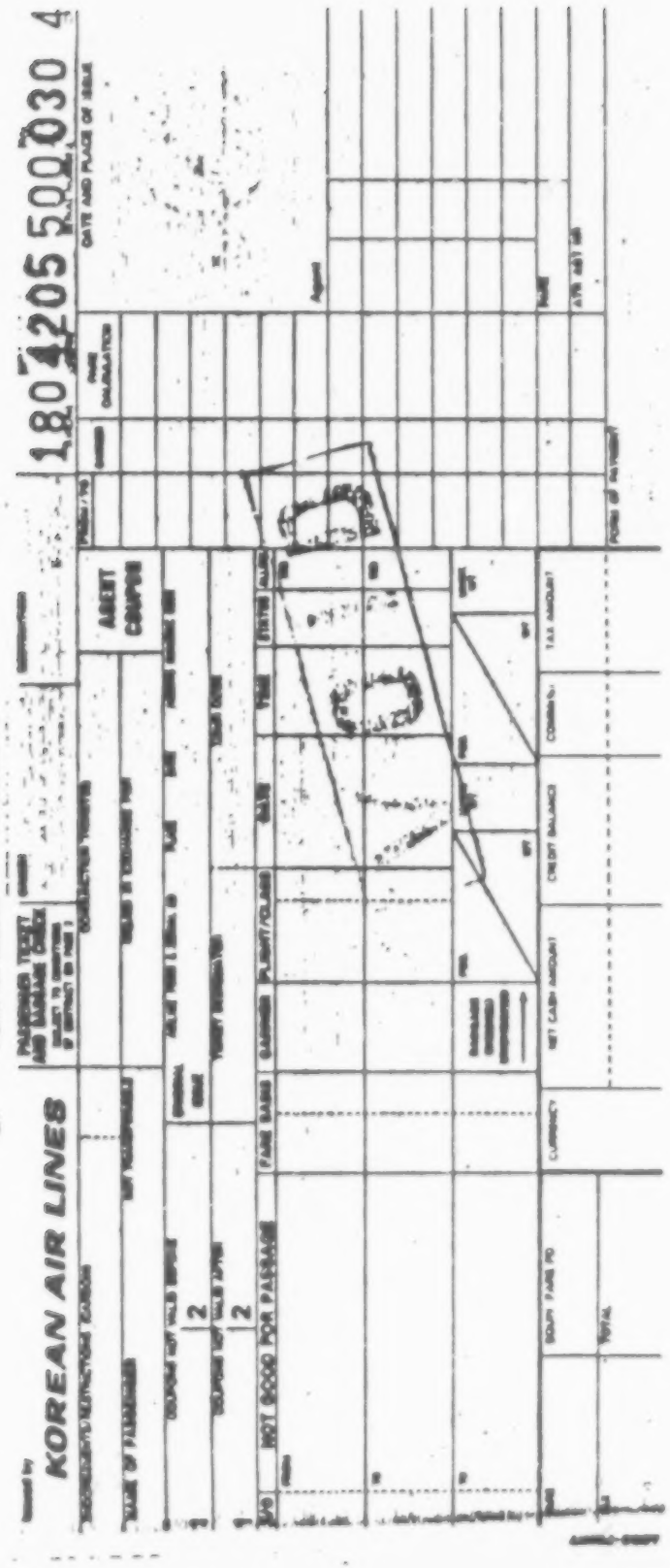
爆発物, 圧縮가스, 引火性物質 多量의 성냥 또는 라이타기름 腐食性, 腐蝕性物質, 放射性物質, 磁気性物質, 旅客에게 不快感을 주는 物質 그리고 航空機, 旅客, 乗務員 및 搭載財産에 損傷을 주기 쉬운 其他 物質, 銃砲, 刀劍 및 其他 類似品目들은 客室内에 持参할 수 없읍니다 仔細한 것은 航空社에 問議하여 주십시요.

搭乘 쿠폰 使用 順序

搭乗用 쿠폰은 旅客用 쿠폰에 記載되어 있는대로 出発地부터 順序에 따라 使用하셔야 합니다.

J.A.105


180 4205 500030 4
AUDIT COUPON
KOREAN AIR LINES
NOT GOOD FOR PASSAGE


180 4205 500030 4
AUDIT COUPON
KOREAN AIR LINES
NOT GOOD FOR PASSAGE

Issued by

KOREAN AIR LINES

PASSENGER TICKET AND BAGGAGE CHECK

SUBJECT TO CONDITIONS OF CONTRACT ON PAGE 3

180 4205 500 030 1

AIRLINE CODE — SERIAL NUMBER — CK

NAME OF PASSENGER — NOT TRANSFERABLE

ISSUED IN EXCHANGE FOR

FLIGHT COUPON 1

COUPONS NOT VALID BEFORE: 1 2

COUPONS NOT VALID AFTER: 1 2

ORIGINAL ISSUE

TICKET DESIGNATOR — VALID STAMP

S/O	FROM / TO	FARE BASIS	CARRIER	FLIGHT/CLASS	DATE	TIME	STATUS	ALLOW
	FROM							
	TO							

BAGGAGE ALLOWANCE — PCS / WGT — PCS / WGT

FARE — EQUIV FARE PD — TAX — TOTAL

ADDITIONAL ENDORSEMENTS / RESTRICTIONS

180 4205500030 1

ISSUING AIRLINE — FARE CALCULATION

DATE AND PLACE OF ISSUE

Agent

FARE — ATR ADT OR

FORM OF PAYMENT

J.A.108

Issued by

KOREAN AIR LINES

PASSENGER TICKET AND BAGGAGE CHECK

SUBJECT TO CONDITIONS OF CONTRACT ON PAGE 3

180 4205 500 030 5

AIRLINE CODE — SERIAL NUMBER — CK

NAME OF PASSENGER — NOT TRANSFERABLE

ISSUED IN EXCHANGE FOR

FLIGHT COUPON 2

COUPONS NOT VALID BEFORE: 1 2

COUPONS NOT VALID AFTER: 1 2

ORIGINAL ISSUE

TICKET DESIGNATOR — VALID STAMP

S/O	FROM / TO	FARE BASIS	CARRIER	FLIGHT/CLASS	DATE	TIME	STATUS	ALLOW
	FROM							
	TO							

BAGGAGE ALLOWANCE — PCS / WGT — PCS / WGT

FARE — EQUIV FARE PD — TAX — TOTAL

ADDITIONAL ENDORSEMENTS / RESTRICTIONS

180 4205500030 5

ISSUING AIRLINE — FARE CALCULATION

DATE AND PLACE OF ISSUE

Agent

FARE — ATR ADT OR

FORM OF PAYMENT

J.A.109

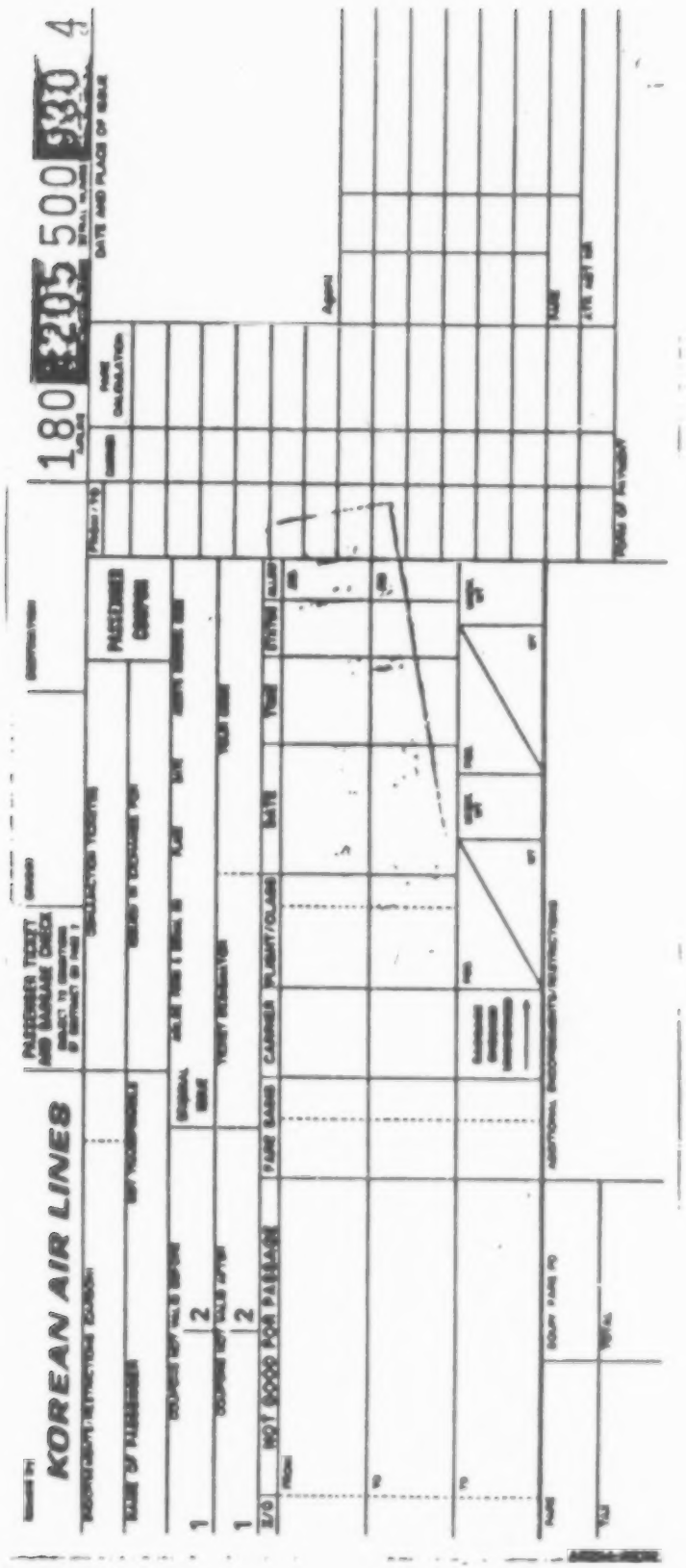


EXHIBIT 5

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL Docket No. 565
Misc. Docket No. 83-0345
All Cases

IN RE: KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1983

Judge Aubrey Robinson

Discovery and Inspection of Defendant KOREAN AIR LINES, held at the offices of Condon & Forsyth, Esqs., 1251 Avenue of the Americas, New York, New York, on the 13th day of January, 1983, at 2:10 o'clock p.m., pursuant to Order, before Walter Holden, C.S.R., a Notary Public of the State of New York.

APPEARANCES:

KREINDLER & KREINDLER, ESQS.
Attorneys for Plaintiffs
99 Park Avenue
New York, New York 10016

BY: MILTON G. SINCOFF, ESQ.

—and—

STEVEN J. POUNIAN, ESQ.,
Of Counsel

CONDON & FORSYTH, ESQS.
Attorneys for Defendant Korean Air Lines
1251 Avenue of the Americas
New York, New York 10020
BY: DESMOND T. BARRY, JR., ESQ.,
Of Counsel

MENDES & MOUNT, ESQS.
Attorneys for Defendant Jeppesen
3 Park Avenue
New York, New York 10016
BY: MATTHEW C. FERGUSON, ESQ.
Of Counsel

MR. BARRY: This is the partial production of documents by Defendant Korean Air Lines pursuant to the order of Judge Robinson, which was filed on December 16, 1983, requiring Korean Air Lines to produce the documents it has in its possession relative to the ticketing of the passengers on this flight.

(Whereupon, document above referred to was marked as Exhibit 1000 for identification, as of this date.)

We are going to produce today photographs of the passenger tickets of those passengers who have commenced litigation as well as sample ticket booklets from which the tickets came.

The photographs that we are going to produce are of the auditor's coupons of the tickets because the flight coupons went down with the aircraft.

The first document I would like to mark is Plaintiffs' Steering Committee's first request of Defendant Korean Air Lines for production of documents and things pursuant to FRCP-34.

For the record, counsel for Korean Air Lines will keep the originals of these documents in the document depository at our office in Washington, D.C. and copies will be provided to all counsel for all parties.

Exhibit 1001 is the response of Korean Air Lines to Plaintiffs' Steering Committee's first request for production of documents and things. This is the response that Judge Robinson's order calls to be served and filed today, and I have some courtesy copies.

(Whereupon, document above referred to was marked as Exhibit 1001 for identification, as of this date.)

MR. BARRY: Exhibit 1002.1 through 1002.59 are 58 passenger tickets of those passengers who have commenced suit against Korean Air Lines to date.

Let me describe Exhibit 1002. What I have done is put the caption of the case to which the particular passenger ticket applies, and there is an indication right below the caption of the case as to the ticket booklet from which that particular ticket would have come. I will explain later how to figure that out. Just so that describes what is on here. Some of the actions have more than one ticket, but it's pretty self-explanatory.

I will stipulate that the photographs of these tickets which I am producing, Exhibit 1002, are business records within the Rule 803(6) of the Federal Rules of Evidence.

(Whereupon, document above referred to was marked as Exhibit 1002.1-1002.58 for identification, as of this date.)

Exhibit 1003 is the, for lack of a better description, I will call sample ticket booklet number 1. There are six different ticket booklets from which tickets for passengers on this aircraft came. Exhibit 1003 is a ticket booklet which was printed on May 1, 1980, and tickets with serial numbers 180-4202 100 001 through 180-4203 360 000 and 180-4400 945 001 through 180-4401 470 000.

(Whereupon, document above referred to was marked as Exhibit 1003 for identification, as of this date.)

MR. BARRY: I am also producing as Exhibit 1004 sample ticket booklet number 2, which was printed on May 1, 1981, and this booklet would contain tickets with serial numbers 180-4203 360 001 through 180-4204 260 000 and 180-4401 470 001 through 180-4401 970 000.

(Whereupon, document above referred to was marked as Exhibit 1004 for identification, as of this date.)

MR. BARRY: Exhibit 1005 is sample ticket booklet number 3, which was printed on June 14, 1982, and would contain tickets with serial number 180-4204 260 000 through 180-4205 160 000 and 180-4401 970 001 through 180-4402 570 000.

(Whereupon, document above referred to was marked as Exhibit 1005 for identification, as of this date.)

MR. BARRY: Exhibit 1006 is sample ticket booklet number 4, printed on May 11, 1983, and this booklet would contain ticket numbers 180-4205 160 001 through 180-4205 560 000 and 180-4402 570 001 through 180-4402 720 000.

(Whereupon, document above referred to was marked as Exhibit 1006 for identification, as of this date.)

MR. BARRY: Exhibits 1003, 1004, 1005 and 1006 are Korean Air Lines ticket booklets.

Also, certain passengers on this aircraft traveled pursuant to either ATC tickets or IOTA tickets.

Exhibit 1007 is a sample ATC ticket booklet, and Exhibit 1008 is a sample of an IOTA ticket booklet. I only have an original of each of those, I will provide Xerox copies. Those two originals must stay with me as well as Exhibit 1003, which is the last ticket booklet which Korean Air Lines has of this series in its possession.

(Whereupon, document above referred to was marked as Exhibit 1007 for identification, as of this date.)

(Whereupon, document above referred to was marked as Exhibit 1008 for identification, as of this date.)

MR. BARRY: I will make photographs of the ticket booklets which are Exhibit 1003, 1007, 1008. I will provide Plaintiffs' Committee with originals of Exhibits 1004, 5 and 6.

The documents that I have produced today are in response to Plaintiffs' Steering Committee's request number 9F(7)(a) and request 9F(8) and also (a) and (b).

Mr. Madole had requested that if possible I stipulate that Korean Air Lines' counterpart to the Montreal Agreement CAB 18900 was the standard counterpart filed by foreign airlines to the Montreal Agreement, and I will so stipulate.

MR. SINCOFF: We have asked Mr. Barry to produce a physical copy of the Montreal agreement as a supplement to our formal requests, and he is looking into it and will produce such an agreement when he verifies that it is the agreement signed by Korean Air Lines and in effect on the date of this catastrophe.

MR. BARRY: That is satisfactory. But the stipulation is still there.

In response to Mr. Sincoff's request that I stipulate that the passengers whose names appear on the tickets I produced today were in fact on Korean Air Lines flight 007 when it was shot down by the Soviets over the Sea of Japan on September 1, 1983, I will state that upon the best information and belief of Korean Air Lines at this time, that the passengers whose names appear on these tickets were in fact passengers aboard that flight.

Request 9F(7) and 9F(8) call for, in addition to passenger ticket coupons, invoices, receipts, charge records, reservation records, et cetera, and at present the only documents that I have in response to those requests are the documents which I produced today. If some other documents within the scope of these requests are in the possession of Korean Air Lines, we will produce them.

MR. SINCOFF: Thank you.

EXHIBIT 6

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL Docket No. 565
Misc. Docket No. 83-0345

IN RE: KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1983

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

AFFIDAVIT

Gilbert Richman, being duly sworn, deposes and says:

I am the president of Counsel Press, Inc., 30 East 40th Street, New York, New York and have been actively engaged in the printing business for four and one-half years.

A "point" is a unit of measurement commonly used in the printing business to measure the size of printing type.

I have carefully measured the point size of the "Advice to International Passengers on Limitation of Liability" (Advice) contained in the following airline passenger ticket booklets.

I examined ticket booklet "2", the original Korean Air Lines Ticket No. 180-4203-580-043-5, marked as Exhibit 1004. The Advice contained in the booklet is printed in marginally less than 8-point type.

I examined ticket booklet "3", the original Korean Air Lines Ticket No. 180-4402-568-030-0, marked as Exhibit 1005. The Advice contained in the booklet is printed in marginally less than 8-point type.

I examined ticket booklet "4", the original Korean Air Lines Ticket No. 180-4205-500-030-4, marked as Exhibit 1006. The

Advice contained in the booklet is printed in marginally less than 8-point type.

/s/ GILBERT RICHMAN
Gilbert Richman

Sworn to before me this
9th day of February, 1984.

/s/ STEVEN R. POUNIAN
Notary Public

STEVEN R. POUNIAN
Notary Public, State of New York
No. 31-4739952
Qualified in New York County
Commission Expires March 30, 1985

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL Docket No. 565
Misc. Docket No. 83-0345

IN RE: KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1983

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

AFFIDAVIT

Michael Minnicino, being duly sworn, deposes and says:

I am the vice president of World Composiiton Services, Inc., 432 Park Avenue South, New York, New York and have been actively engaged in the printing business for five and one-half years.

A "point" is a unit of measurement commonly used in the printing business to measure the size of printing type.

I have carefully measured the point size of the "Advice to International Passengers on Limitation of Liability" (Advice) contained in the following airline passenger ticket booklets.

I examined ticket booklet "2", the original Korean Air Lines Ticket No. 180-4203-580-043-5, marked as Exhibit 1004. The Advice contained in the booklet is printed in 8-point type.

I examined ticket booklet "3", the original Korean Air Lines Ticket No. 180-4402-568-030-0, marked as Exhibit 1005. The Advice contained in the booklet is printed in 8-point type.

I examined ticket booklet "4", the original Korean Air Lines Ticket No. 180-4205-500-030-4, marked as Exhibit 1006. The Advice contained in the booklet is printed in 8-point type.

/s/ MICHAEL MINNICINO
Michael Minnicino

Sworn to before me this
9th day of February, 1984.

/s/ STEVEN R. POUNIAN
Notary Public

STEVEN R. POUNIAN
Notary Public, State of New York
No. 31-4739952
Qualified in New York County
Commission Expires March 30, 1985

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

MDL Docket No. 565
Misc. No. 83-0345

Civil Action Nos. 83-2793, 2794, 2941, 3007, 3154, 3177, 3204, 3441, 3445, 3448, 3449, 3450, 3451, 3452, 3453, 3454, 3455, 3456, 3457, 3458, 3459, 3460, 3461, 3462, 3463, 3464, 3465, 3466, 3467, 3468, 3469, 3470, 3473, 3474, 3587, 3588, 3678, 3792, 3793, 3889, 3890, 3891, 3898, 3901, 3902, 3903; 84-0029, 0030, 0133, 0402

IN RE KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1983

STATEMENT OF GENUINE ISSUES OF KOREAN AIR LINES CO., LTD. PURSUANT TO CIVIL RULE 1-9(h)

Pursuant to Rule 1-9(h) of the Civil Rules of this Court, defendant KOREAN AIR LINES CO., LTD. (hereinafter KAL) submits the following statement of material facts as to which it contends there exist genuine issues necessary to be litigated.

1. Defendant KAL admits the truth of the facts contained in paragraphs 1, 2, 3, 5, 6, 7, 8 and 9 of the Statement of Material Facts submitted by plaintiffs in support of their motions for partial summary judgment.

2. Defendant KAL denies the truth of the material facts contained in paragraphs 4, 10 and 11 of the Statement of Material Facts submitted by plaintiffs in support of their motions for partial summary judgment except that KAL admits that on May 21, 1969 KAL filed its counterpart to CAB Agreement 18900 with the Civil Aeronautics Board of the United States.

3. In accordance with the specifications of the Montreal Agreement, KAL ordered tickets from a printer with the Montreal Advice printed in a type size at least as large as 10 point modern type.

4. Apparently as a result of the printing process, a printing irregularity occurred and the Montreal Advice on some KAL tickets was reproduced in a type size that was not as large as 10 point modern type size.

5. The Montreal Advice on page 4 of KAL sample passenger ticket booklets "2", "3" and "4" was printed in a type size not quite as large as 10 point modern type size.

6. The difference in type size between the Montreal Advice on the tickets issued to plaintiffs' decedents and 10 point modern type size is 2/72 of an inch.

7. The difference in size of the letters of the Montreal Advice in the KAL tickets issued to plaintiffs' decedents and 10 point modern type size cannot be detected by the naked eye of the average layman and is miniscule. It is only after measurement with an appropriate optical device that any difference can be detected.

8. The Montreal Agreement does not specify any sanction against an airline whose tickets do not contain a Montreal Advice printed in at least a 10 point modern type size.

9. KAL delivered a passenger ticket to each of plaintiffs' decedents which contained an Advice to International Passengers on Limitation of Liability in a print size that is easily readable and which notified each of plaintiffs' decedents of the applicability of the Warsaw Convention to their transportation.

10. KAL delivered to each of plaintiffs' decedents a passenger ticket containing adequate notice of the applicability of the Warsaw Convention to the transportation in a timely manner so as to afford each passenger a reasonable opportunity to take self-protective measures against the limitation of liability.

11. Plaintiffs' decedents had reason to know that their overall transportation was international before embarking on their respective journeys.

12. The identity of the proper representatives of the decedents listed in Appendix A and Appendix B and whether they have the proper capacity to bring these actions under applicable law.

Dated: Washington, D.C.
March 21, 1984

Respectfully submitted,

CONDON & FORSYTH

By /s/ GEORGE N. TOMPKINS, JR.
George N. Tompkins, Jr.

Attorneys for Defendant
KOREAN AIR LINES CO., LTD.
1100 15th St., N.W.
Washington, D.C. 20005
(202) 289-0500

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

MDL Docket No. 565
Misc. No. 83-0345

Civil Action Nos. 83-2793, 2794, 2941, 3007, 3154, 3177, 3204, 3441, 3445, 3448, 3449, 3450, 3451, 3452, 3453, 3454, 3455, 3456, 3457, 3458, 3459, 3460, 3461, 3462, 3463, 3464, 3465, 3466, 3467, 3468, 3469, 3470, 3473, 3474, 3587, 3588, 3678, 3792, 3793, 3889, 3890, 3891, 3898, 3901, 3902, 3903; 84-0029, 0030, 0133, 0402

IN RE KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1983

RULE 56(f) AFFIDAVIT IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

GEORGE N. TOMPKINS, JR., being first duly sworn, deposes and says:

1. I am an attorney and counsellor at law and a member of the firm of Condon & Forsyth, attorneys for defendant KOREAN AIR LINES CO., LTD. (hereinafter KAL) in these multidistrict litigation proceedings. I have participated in the defense of this litigation since its inception and I am fully familiar with all the proceedings heretofore had herein.

2. I submit this Affidavit pursuant to Rule 56(f) of the Federal Rules of Civil Procedure in opposition to plaintiffs' motions on the grounds that discovery by means of written in-

terrogatories, document requests and depositions addressed to the issue of the amount of compensatory damages allegedly due plaintiffs is necessary before defendant KAL can "present by affidavit facts essential to justify" its opposition to this "branch" of plaintiffs' motions for partial summary judgment. Fed. R. Civ. P. 56(f).

3. In this second "branch" of plaintiffs' motions, the Appendix B plaintiffs and the Belli plaintiffs have moved this Court for an Order directing defendant KAL to promptly pay to the families of each plaintiff listed in Appendix B damages up to the limitation of liability of $75,000 imposed by the Warsaw Convention as supplemented by the Montreal Agreement. In support of the motions, plaintiffs allege that the recoverable compensatory damages in each of these cases exceeds the sum of $75,000 and, therefore, plaintiffs are entitled to immediate partial summary judgment for that amount.

4. Plaintiffs' motions for immediate payment of the $75,000 limitation of liability are premature. KAL is entitled to discovery in order to ascertain the full extent of the evidence plaintiffs intend to present in support of their claims for damages under applicable law and the identity of the proper party plaintiffs. Such discovery could determine that a particular plaintiff is not the proper representative of the decedent, lacks the capacity to sue or, moreover, that certain plaintiffs' damages, under applicable law, are less than the $75,000 limitation of liability.

5. Without the benefit of this damage discovery, KAL is not able at this time to present by affidavit to this Court the essential facts with respect to either the proper amount of recoverable damages or the proper party plaintiff in each case, which facts would serve to justify KAL's opposition to this "branch" of plaintiffs' partial summary judgment motions. For this reason alone, plaintiffs' motions should be denied in their entirety.

6. Therefore, should the Court determine that partial summary judgment for limited damages is not precluded by the applicable law, as urged by KAL in its Statement of Points and Authorities in Opposition, pp. 64-70, KAL requests an opportunity to conduct damage discovery in each of the cases listed in

Appendix B before this Court entertains this "branch" of plaintiffs' motions for partial summary judgment.

7. There are submitted with KAL's Statement of Points and Authorities in Opposition as exhibits true copies of the following documents:

Exhibit	*Title*
A	*II Conference Internationale de Droit Privie Aerien, 4-12 Octobre 1929, Varsovie*, ICAO Doc. No. 7838 (1957)
B	*Second International Conference on Private Aeronautical Law Minutes, Warsaw, 1929* (R.C. Horner & F. Legrez trans. 1975)
C	I *International Conference on Private Air Law, The Hague, September, 1955, Volume I Minutes*, ICAO Doc. No. 7686—LC/140 (1956)
D	II *International Conference on Private Air Law, The Hague, September, 1955, Volume II, Documents*, ICAO Doc. No. 7686—LC/140 (1956)
E	Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw 12 October 1929, September 28, 1955, 478 U.N.T.S. 371
F	U.S. DEP'T OF STATE, PRESS RELEASE No. 268, 50 Dep't State Bull. 923 (1965)
G	U.S. DEP'T OF STATE, PRESS RELEASE No. 110, 54 Dep't State Bull. 955 (1966)
H	U.S. DEP'T OF STATE, PRESS RELEASE No. 111, 54 Dep't State Bull. 955 (1966)
I	CAB Order E-23680, 31 Fed. Reg. 7302 (1966)
J	Reply Brief of Petitioner To The Memorandum For The United States as *Amicus Curiae*, *Alitalia—Linee Aeree Italiane, S.p.A. v. Lisi*, 390 U.S. 455 (1968)

K Memorandum For The Civil Aeronautics Board as *Amicus Curiae, Alitalia—Linee Aeree Italiane, S.p.A. v. Lisi*, 390 U.S. 455 (1968)

L Brief of Canada as *Amicus Curiae, Alitalia—Linee Aeree Italiane, S.p.A. v. Lisi*, 390 U.S. 455 (1968)

M International Air Transport Association (IATA) Resolution 724

N Opinion in *O'Rourke v. Eastern Air Lines, Inc.*, Nos. 83-6065, 83-6071, slip op. 2143-2178 (2d Cir. Mar. 2, 1984)

WHEREFORE, defendant KOREAN AIR LINES CO., LTD. requests this Court to issue an Order denying plaintiffs' motions for partial summary judgment in their entirety and for such other further and different relief as to this Court might seem just and proper.

/s/ GEORGE N. TOMPKINS, JR.
George N. Tompkins, Jr.

Sworn to before me this
21st day of March, 1984

/s/ LAWRENCE MENTZ
Notary Public

LAWRENCE MENTZ
Notary Public, State of New York
No. 31-4513579
Qualified in New York County
Commission Expires March 30, 1985

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

MDL Docket No. 565
Misc. No. 83-0345

Civil Action Nos. 83-2793, 2794, 2941, 3007, 3154, 3177, 3204, 3441, 3445, 3448, 3449, 3450, 3451, 3452, 3453, 3454, 3455, 3456, 3457, 3458, 3459, 3460, 3461, 3462, 3463, 3464, 3465, 3466, 3467, 3468, 3469, 3470, 3473, 3474, 3587, 3588, 3678, 3792, 3793, 3889, 3890, 3891, 3898, 3901, 3902, 3903; 84-0029, 0030, 0133, 0402

IN RE: KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1983

AFFIDAVIT OF ABRAHAM L. MEILEN

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ABRAHAM L. MEILEN, being first duly sworn, deposes and says:

1. I am over 21 years of age and employed by Harborview Press, Inc., 480 Canal Street, New York, New York. I have been employed in various capacities in the printing industry since 1931, including 19 years as an officer for a company that was one of the official printers for the United States Court of Appeals for the Second Circuit. I submit this Affidavit based upon my own personal knowledge and if necessary I could testify competently to the facts contained herein.

2. I have carefully examined the original of the following sample ticket booklets of Korean Air Lines Co. Ltd. (KAL):

a. Booklet "2", used for tickets printed on May 1, 1981 with serial numbers 180-4203 360 001 through 180-4204 260 000 and 180-4401 470 001 through 180-4401 970 000;

b. Booklet "3" used for tickets printed on June 14, 1982 with serial numbers 180-4204 260 000 through 180-4205 160 000 and 180-4401 970 001 through 180-4402 570 000; and

c. Booklet "4" used for tickets printed on May 11, 1983 with serial numbers 180-4205 160 001 through 180-4205 560 000 and 180-4402 570 001 through 180-4402 720 000.

3. With respect to each of these sample ticket booklets, the type size of the text of the "Notice" on page 2 is printed in bold letters of 8 point type size and paragraph 2 in the Conditions of Contract on page 2 is printed in bold letters of 6 point type size. On page 4 of each booklet, the text of the "Advice to International Passengers on Limitation of Liability" is printed in bold letters of 8 point type size.

4. Printed matter contains 72 "points" per vertical inch. Thus, one "point" is equivalent to one seventy-second of an inch. The difference in size between 8 point type and 10 point type is, therefore, two seventy-seconds of an inch. This difference, in my opinion, cannot be detected by the naked eye of the average layman and is miniscule. In fact, I used an optical magnifier to measure the type size of the "Advice to International Passengers on Limitation of Liability" on page 4 of the KAL sample ticket booklets "2", "3" and "4".

5. The phrase "10 point modern type" does not necessarily refer to a specific type of a certain size. The term "modern type" is often used in the printing trade in a generic sense to describe a variety of typefaces that were introduced to the printing trade approximately 50 years ago. Even though something is printed in "10 point modern type" it does not mean that an individual letter is 10 "points" in size. Thus, something printed in "10 point modern type" using one typeface style may contain letters varying in size from something printed in "10 point modern type" using a different typeface style. It is improbable that the average layman could determine by looking at the size of an

individual letter whether it is printed in "10 point modern type" or something less or greater in size.

6. The "Advice to International Passengers on Limitation of Liability" on page 4 of the KAL sample ticket booklets was printed and then offset so that it appears to be 8 point type. The process of offsetting reduces the print size somewhat. It is possible, therefore, that the original print of the "Advice to International Passengers on Limitation of Liability" in the KAL tickets was 10 point type but was reduced in size by the offsetting process.

7. The primary difference between 8 point type and 10 point type is that 10 point type of a specific text face is somewhat larger than 8 type of the same text face. As a result, 10 point type contains fewer lines of print per inch than 8 point type, assuming there is no leading between lines.

8. As illustrated by the United States Government Printing Office pamphlet *Specimens of Type Faces* (attached hereto as Exhibit "A"), 10 point type of one text face varies in appearance and readability from 10 point type of another text face. For example, "11 Point No. 21" (Linotype) type has the appearance of 11 point type while "Cheltenham Condensed" (Monotype) type has the appearance of being smaller than 10 point type. Both of these types as shown in the respective paragraphs of Exhibit "A", however, are printed in 10 point type.

9. The "Advice to International Passengers on Limitation of Liability" on page 4 of the KAL ticket booklets "2", "3" and "4" is within the range of size of type faces listed in Exhibit "A" hereto. The "Advice to International Passengers on Limitation of Liability" in the KAL sample ticket booklets "2", "3" and "4" is more readable than some of the 10 point type faces shown in Exhibit "A" and is equally as readable as the majority of the type faces listed therein. It also is readily apparent that the print of the "Advice to International Passengers on Limitation of Liability" in the KAL ticket booklets is larger than some of the samples of 10 point type size shown in Exhibit "A" hereto.

/s/ ABRAHAM L. MEILEN
Abraham L. Meilen

Sworn to before me this
20th day of March, 1984

/s/ CRUZ DUENO
Notary Public

DUENO CRUZ
Notary Public, State of New York
No. 03-4779616
Qualified in Bronx County
Certificate Filed in New York County
Commission Expires March 30, 1985

EXHIBIT A

SPECIMENS OF

type FACES

UNITED STATES GOVERNMENT
PRINTING OFFICE

WASHINGTON-1969

48 DIFFERENT 10 POINT TEXT FACES

Bodoni (Linotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They

Bookman (Monotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They

Cheltenham Bold Condensed (Linotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may therefore be

Baskerville (Linotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may

Caslon Oldstyle (Monotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may therefore be con-

Clarendon (Linotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may

Baskerville (Fotosetter)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner.

English Caslon (Monotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may

11 point No. 21 (Linotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern

Baskerville Bold (Linotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may

Century Bold (Linotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern

Garamond (Monotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may there-

Bodoni Book (Linotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may there-

Century Expanded (Linotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern

Garamond (Intertype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may therefore be con-

Bodoni (Monotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may

Century Schoolbook (Fotosetter)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern

Garamond Bold (Linotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may there-

Bodoni Bold (Linotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern

Cheltenham (Monotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may therefore be

Granjon (Linotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may therefore be

Bodoni Modern (Linotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in

Cheltenham Condensed (Monotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may therefore be considered heavier weight old-

Goudy Text (Monotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may therefore be considered heavier weight oldstyle and

J.A.132

J.A.133

BEST AVAILABLE COPY

Each block of copy is 2 pt leaded

Scenic (Monotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and

Kennerley (Monotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may therefore

Kennerley Bold (Monotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern

Times Roman (Linofilm)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They

Stymie Medium (Monotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner.

Stymie Bold (Monotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and mod-

Alternate Gothic (Monotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may therefore be considered heavier weight old-

Franklin Gothic (Monotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern

News Gothic (Intertype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They

News Gothic Bold (Intertype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They

News Gothic Condensed (Intertype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may therefore be considered heavier weight oldstyle

Sans Serif Medium (Monotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may there-

J.A.134

BEST AVAILABLE COPY

Typewriter (Linotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in

Memphis Light (Intertype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner.

Memphis Medium (Linotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner.

Stymie Light (Monotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner

Futura Demibold (Linotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They

Futura Demibold Condensed (Fotosetter)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may therefore be considered heavier

Futura Medium (Fotosetter)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may there-

Lightface Gothic (Monotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern

Sans Serif Bold (Monotype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may there-

Spartan Book (Linofilm)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They may there-

Spartan Heavy (Linofilm)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldstyle and modern manner. They

Vogue Bold (Intertype)
The antique faces have no hairlines and are darker in tone than the oldstyle, transitional, and modern faces. They are made in both the oldsty
and modern manner. They may there-

J.A.135

EXHIBIT B

SECOND
INTERNATIONAL CONFERENCE
on
PRIVATE AERONAUTICAL LAW
MINUTES
WARSAW, 1929

Robert C. Horner
Didier Legrez

Fred B. Rothman & Co.

SIXTH SESSION
October 9th, Morning

The session is open at 10 o'clock, Mr. Lutostanski presiding.

THE PRESIDENT: Sirs, the preparatory committee has finished its work.

I ask Mr. Giannini, President of this committee, to acquaint us with the results of this work.

MR. GIANNINI (Italy): Sirs, the preparatory committee examined all the questions of substance number 2, given that the wording is still reserved. The committee ruled on each article. The Reporter will kindly indicate the decisions that it took.

On most of the questions, I may say on the majority of the questions, agreement was reached, but there still remain some questions upon which the conference will have to pass. I will ask the delegates who have reservations to make, to make them on the record; that will permit us to hasten our work, and this is indispensable, because we must now do the drafting, and this is a large task.

I propose that we begin our examination article by article, beginning with the first; as we have examined in our last plenary session questions of substance number 1, we will certainly be in agreement on the substance of each article. For articles for which there are questions which concern the Report of Mr. De Vos, the Reporter will kindly explain the results to which we arrived.

I believe that in this way we can proceed quite rapidly. If the conference could finish this morning an examination of questions of substance number 2, the drafting committee would be able to meet even this afternoon.

THE PRESIDENT: I believe that there is no opposition to adopting the method proposed by Mr. Giannini, and I ask the Reporter to present to us his observations on the first article.

MR. DE VOS, Reporter: Mr. President, Sirs, I believe that we are not quite in agreement on the procedure which was indicated by Mr. Giannini. I think that it would be better to take first of all the articles upon which there are observations of substance. After this morning's session, which could be short, we might refer our decisions to the drafting committee, which

would give us definitive texts, and then all the articles could be examined tomorrow.

If you will permit me, I will limit myself now to presenting general observations made on the present text following amendments of substance which had been retained.

I believe that I must pay tribute, here, to the President of the preparatory committee. The night before last he had promised us to meet this morning; yesterday, the day passed in discussing, in working steadily, relentlessly, enthusiastically, thanks to the spirit with which Mr. Giannini imbued the committee. In the name of all the committee, I thank him quite sincerely! (Applause). It's not personal thanks, as he said yesterday, but the unanimous thanks of all the delegates.

I would still like to address one word of thanks to others besides the President: To all the delegates who have presented amendments and who, after a short exchange of views, hastened to withdraw their amendments; not that they were not justified, but because they deviated from the framework of the Convention, which has been limited to certain rules of unification regarding international air carriage.

You cannot expect me to make too detailed a report; we worked very late yesterday evening and I didn't have the time to reflect upon that which was done. I will try to sum up simply, but accurately, the resolutions to which we arrived.

I would like first of all to make a general observation. Certain amendments which seems to us very justified and very reasonable, and, notably, certain commentaries which supported these amendments were illuminating, precise, and brought us very serious enlightments, but above all for the future work of the CITEJA. Thus, among others, were some of the amendments presented by the Brazilian Delegation. The solution which the preparatory committee believed had to be taken was to ask the general assembly to request that the CITEJA take up the diverse points raised by these amendments. The drafting committee will take upon itself, besides, the task of preparing these requests and presenting them to the general assembly for acceptance.

Here are the principal modifications which were accepted by your preparatory committee. It's up to you to determine if you must follow its point of view.

Article 1: There was a British amendment, which is truly an amendment of wording, which consists in applying the text to the special situation which is found in the British Empire.

You have seen that in paragraph 2, in paragraph 3, and in one other article, we speak "of contracting States". Here is the situation which arises from the point of view of the British Empire.

The Empire, when it signs, commits itself by a signature, that of the chief of State, His Majesty the King of Great Britain; but to commit each State, each State must ratify especially the Convention or the King of England must commit it especially or by special mandate. From the point of view of ratification, there may be several ratifying states, but when there are two States, such as the Union of South Africa and India which have ratified, there are not two separate States from the point of view of the Convention, and the carriage which would take place between these two States is not international carriage.

Therefore, for the application of the Convention, the words "two contracting States" in the British Empire means only one single contracting State from the point of view of the Convention.

The British Delegation suggested a new text to us taking into account this special situation. It proposes the substitution in the first paragraph of the following text:

> Shall be deemed 'international carriage', within the meaning of the present Convention, all carriage in which according to the stipulations of the parties, the point of departure and the point of destination, whether or not there be interruption of carriage or transshipment, are situated either on the territory of two High Contracting Parties, or on the territory of one single High Contracting Party, if a stopover is provided for in a territory under the sovereignty, or the authority of another Power. Carriage between territories under the sovereignty or authority of the

same High Contracting Party shall not be considered as international in the sense of the present Convention.

The second point taken up concerns Article 2. It is more important.

MR. GIANNINI (Italy): There is still something else for Article 1; there are still two questions. There is a Japanese proposal and a Brazilian proposal.

The Brazilian proposal is thus conceived:

> Given that the status of the air carrier deviates, by the very international character of the aircraft, from rules relating to the captain in the merchant fleet, to the boatman in river navigation, to the conductor in land communication, this designation should be able to assimulate the multiple concepts on his liability.
>
> This is even more necessary: That the word 'carrier', so adequate with a view towards its final purpose, nevertheless, does not correspond exactly to most of the definitions given to it by the laws of the different countries. It is employed neither by the French texts in the majority of international conventions, nor by the draft concerning liability for damages to third parties, presented in May by Mr. Ambrosini, which looks only towards the owner and the user of the aircraft.
>
> If one wants the carrier to be the air carriage contractor or its operator, within the meaning of economic control of the aircraft set forth by German, Swiss, Hungarian, Dutch, etc., case law, or, to be he on whose account the aircraft is used, according to Danish law;
>
> If one wants to include in the Convention the concept of joint liability provided by Polish law, Article 71, between the owner and the carrier, or that of Brazilian law between the pilot and the ship owner;
>
> If one wishes to bring the English concept of leasing closer to the general formula, in air carriage, characterized by the period of contract, a concept existing in the laws of several North American states . . . one could attain this goal in qualifying the carrier equally with carriage.
>
> I would propose to this effect, but for better wording:

> 'Shall be deemed a carrier he who, owner, charterer, or operator of the aircraft, uses it individually or jointly in the carriage of persons and goods, within the meaning of the present Convention, and in conformity with national regulations'.

As regards the proposal of Brazil, the committee deemed that this problem was not within the scope of this Convention. Given that, in this article, we have made declarations, definitions for practical reasons, that is to say, that the codification of private air law happens progressively, we are obliged to anticipate somehow, we have envisaged certain problems which touch other Conventions. But, as in this case it was not necessary to define the carrier, we have thanked our colleague from Brazil, who made a great effort, and we have referred his proposal to the CITEJA to take under consideration. Thus, there is no decision to take.

We have, moreover, at Article 1, a proposal from the Japanese Delegation upon which it does not insist.

There remains, then, the point of which the Reporter spoke and upon which the conference must pass.

THE PRESIDENT: I believe that it is necessary to refer the article to the drafting committee which will give us a definitive text.

No one opposes? . . . It is so decided.

MR. DE VOS, Reporter: At Article 2, we have a British proposal which consists in reserving to the Government of the United Kingdom, the liberty of not applying the Convention when it concerns carriage performed by the State. This reservation is very serious. Whenever carriage, done by the State for whatever purpose is involved, by no matter what organ of the Government which can invoke the prerogatives of the Crown, the Convention will not apply.

Our committee considered that this question should be examined by the plenary conference.

Mr. Giannini, President of the Committee has the floor.

MR. GIANNINI (Italy): Sirs, the question which was presented by the British Delegation—I must draw the attention of the conference to this point—is connected to the problem of

merchant fleets dealt with in the Brussels Convention in which the British Empire dealt also with the question of State vessels. We are in the same situation, given that there is a quite special request, quite particular, from England, which is explained in the note which you find at Article 2 of the draft.

The British reservation has great importance in practice: for the moment, it has none, given that there are no air carriers belonging to the State, but there remains nonetheless, the possibility that this hypothesis may occur.

Moreover, the Delegation from the USSR presented a formula which says the same thing: "The Government of the USSR states that it reserves the application of the Convention to aircraft which are under the direct control of the State".

I must say that in the Italian Delegation we are in a very difficult state of mind: Our hope was that after the agreement was reached for merchant ships, the question would not have been raised in this conference. Given that it was raised, we find ourselves in the situation where we were before the Brussels Convention for maritime law. The same reserve was expressly demanded by the British Government, but if one provides for this reserve for Great Britain, each State will have the right to do the same thing.

I don't say that we must insert in the Convention an article such as that which was proposed by the Delegation from the USSR; but I believe that one must insert an article to give the liberty to States to be able, them also, when they want, to declare that the Convention does not apply to State aircraft, that is to say, a general clause which will confer upon States the right of arranging their particular situation according to their wishes, if by chance, tomorrow, circumstances render it necessary.

MR. SABANIN (USSR): Two words only: In the case of non-acceptance of the stipulation in the sense of the British reservation, I am ready to withdraw my amendment.

SIR ALFRED DENNIS (Great Britain): This reservation applies only to the English State and, at the last minute, to the Union of South Africa and Australia, because I have only recently received my full powers from these Governments. But if the other States wish to make the same reservation, I will make no objection.

The difficulty is that I have formal instructions to make this reservation, and I was not able to have new communications from my Government. If my Government wishes to withdraw this reservation, I will withdraw it immediately.

I cannot help but remark that it is quite a pity that this reservation, one that I have made right from the first sessions of the CITEJA, and one that I have renewed during three years, raised no objection, and that today, for the first time, some are presented. If it had been otherwise, I would have been able to consult my Government and perhaps to receive broader instructions; but I have formal instructions. My colleagues will understand that I find myself at an impasse and I can do nothing. I am obliged, whatever it costs me, to tolerate this situation.

MR. RIPERT (France): It is quite true, that right from the first sessions the British Government has always indicated to us that it would ask for a reservation for carriage performed by the State; but I do believe that most of us had understood that it would be a question of carriage performed by the State in the public interest, an interest of the State, and not merely commercial carriage. The tendency of all States is, in effect, at the present time, to treat commercial enterprises created by the State as enterprises created by individuals.

Mr. Giannini responded that in Brussels a convention was done in this sense. Under the form which is presently presented, the reservation of the British Government tends to checkmate the Convention everytime the carriage is performed by an aircraft belonging to the State. I understand well that in the spirit of my colleagues the reservation is quite theoretical for the moment, because there is no country where such carriage is performed under these conditions at the present time. But, nothing says that tomorrow States will not do this carriage themselves, and it would be inadmissable that in a Convention where all States must be on equal footing, England not be under the Convention when all the other States would be.

I profoundly regret this proposal because that is going to permit all States who themselves organize commercial carriage to escape from the rules of the Convention, but I see that it is necessary to declare that if the British reservation is maintained, we will ask that it be extended in a general way to all the other

States, and we ourselves will make a declaration saying that the French Government reserves the right not to apply the Convention to carriage performed by a State-owned company.

MR. DE VOS, Reporter: Mr. Ripert has just said very well that which I would probably have poorly explained, notably as regards the misunderstanding which seems to exist between the British Delegation and the other delegates.

If we adopt the reservation proposed by the British Government—even with a majority vote or with near unanimity, we will not be able to oppose a reservation made to the Convention when it is a condition "sine qua non" to its acceptance—I fear indeed that we perform a task which will not be a progressive one. The British Delegation, for some years, insists upon having admitted this principle, and the Maritime Convention had, on the contrary, accepted the principle which we wish to make dominant here, that is to say, to consider all commercial carriage by the State as ordinary carriage, and not to create for them a special situation in commercial exploitation, in the universal commercial community.

I understand perfectly the situation of the British Delegation which is always cooperative, but I ask that one restrict as much as possible the application of this reservation, that one not extend under a general form the reservation proposed by the British Delegation, and which concerns only countries for whom it has an express mandate to act thus.

I add that the Spanish Delegation asks to make a reservation as regards the application of the Convention to State aircraft destined for public service, to military service. This is indeed the sense that we had attached to the reservation presented to the CITEJA and which is in conformity with the reservation made in maritime law.

SIR ALFRED DENNIS (Great Britain): We did not have the intention of applying it to others.

MR. RICHTER (Germany): I didn't understand well the amendment from the Delegation of the USSR. Is it a question of aircraft which are directly under the control of the State?

MR. BABINSKI (Poland): It would perhaps be possible for the British Delegation not to make this reservation at this time; that is to say that one will be able to insert a general article on

the possibility of making reservations in the sense that it was indicated here. The British Delegation will make no reservation at this time, given that it will have the opportunity to make it later on, so that if, after having consulted its Government, it arrives at the conclusion that one could, even for England, not make this reservation, or make it in a very restricted way, it would disappear from the Convention. Under these conditions, the example will not be followed, whereas if the reservation is made here, I fear very much that it will be followed.

MR. GIANNINI (Italy): Mr. Babinski has made a proposal which corresponds to mine. My proposal is that the High Contracting Parties could declare at the moment of ratification that they except from the application of the Convention State aircraft, except for wording of course. I have declared that, in the meantime, England's ratification would let us know if it maintained its reservation or not, and that the other states would then see if they should ratify with or without reservation. If there is no reservation, we won't add any, but if there is a reservation, we will not be able to show a more liberal spirit than our neighbors.

SIR ALFRED DENNIS (Great Britain): I accept this proposal.

MR. SABANIN (USSR): I accept as well.

MR. PITTARD (Switzerland): It would be in the protocol and not in the Convention.

THE PRESIDENT: Sirs, I put to a vote Mr. Giannini's proposal which you have just heard, it being understood that the drafting committee will put the formula in final form.

(Adopted).

MR. DE VOS, Reporter: Sirs, the third article relates to the passenger ticket and to the particulars which must be found on the passenger ticket.

There has been first of all a Polish proposal consisting in providing for two copies of the passenger ticket.

The committee has considered that it was useless in the face of present practice to provide for two copies. These words, besides, could have led to an erroneous interpretation and lead one to believe that two separate papers were necessary, when actually it is simply one booklet with stubs.

A second proposal concerned letter (c).

The Hungarian, British and German Delegations suggested the elimination of the second part of the sentence, that is to say: "as well as the contemplated stopping places".

These Delegations have observed, following the air carriers, that in practice it was very difficult to give the indication of the route to be followed, even in a summary fashion, given that the first carrier has no knowledge of the second and the third for the whole of the contract of carriage.

Next, following certain necessities of the operation of the routes, it is necessary that the route to be followed be modifiable.

What is important for the application of the international convention is to maintain the contemplated stopping places through common agreement, and your committee has deemed that it could retain the amendment suggested by a certain number of delegations.

The letter (c) would thus say simply: "the contemplated stopping places".

The British Delegation, moreover, had proposed adding a particular, providing that the contemplated stopping places could be modified in the case of necessity:

> (c.) Indication of contemplated stopping places.
>
> It may be stipulated that the carrier shall be authorized to modify the stopping places mentioned in case of necessity, but the carriage shall conserve its international character, if it is defined as such by the passenger ticket.

It has been understood that this particular would appear in the text of the Convention after modification by the drafting committee. The meaning of this addition is that the case of "force majeure" must include necessity.

The letter (d) indicates: "the name and the address of the carrier or carriers".

Certain delegations have proposed eliminating "or carriers" and limiting the text to the following wording: "the name and address of the carrier".

In reality, if one had accepted this modification, the liability action in favor of passengers would have become impossible. The committee therefore maintained the present text.

The German Delegation and the Czechoslovakia Delegation have proposed adding the indication for the price of carriage.

The Polish and Brazilian Delegations have asked the addition of the indication of the name and address of the traveler. The Brazilian Delegation added the traveler's nationality. Here is what the Brazilian Delegation said:

> The Havana Convention requires, in Article 9, a list of names of passengers with their addresses and nationalities.
>
> The laws of several European States and international conventions set forth as well the necessity of this boarding document.
>
> The Swiss decree of January 27, 1920 includes it among the eight necessary documents; Latvian law of 1926, Article 22 letter (d), requires it as well, as well as the Chilean decree of 1925, Article 13, the Norwegian law of 1923, Article 41, the Brazilian law of 1925, Article 75, etc. . . . The bill approved for discussion by the French Senate in 1923 says in Article 48: 'A list of embarking passengers shall be prepared, of which the duplicate shall be found on board the aircraft, and be communicated upon their request to the authorities in charge of the transit police'.

The Franco-Spanish Convention of 1928 requires a list of names of travelers, Article 8; in the same way the Polish-Austrian Convention of 1925, Article 14; the German-Czechoslovak Convention, Article 10, etc.

Thus, I would propose adding after letter (d) of Article 3: "(e) the name, address and nationality of the travelers".

These proposals were rejected, not that they will not or would not appear on the passengers ticket—in fact, these headings are found thereon. But in the face of an observation of the Greek Delegate, which is as follows—The last paragraph of the article provides for sanctions in the case of the absence of this passenger ticket, or when the passenger ticket does not contain all the particulars indicated, consequently the sanction is too severe when it's a question of a simple omission, of the negligence of an employee of the carrier—the committee allied to this point of view and, in the last paragraph, it eliminated the words: ". . . or if the ticket does not contain the particulars indicated above".

But the consequence was that it was necessary to be much more severe for particulars imposed on the passenger ticket, and we have retained only the indispensable minimum to be able to consider the carriage as international carriage in the meaning of the Convention. It was added that in practice the delegates were satisfied, and that all the carriers wrote down the particulars which they wanted to see appear on the ticket.

MR. GIANNINI (Italy): I ask the Reporter to give us the article such as it is now prepared now.

MR. DE VOS, Reporter: It's the same text as the draft; there is only the elimination at letter (c) of the summary indication of the route to be followed and the addition of the British amendment, after wording; at the last paragraph, elimination of "or if the ticket does not contain the particulars indicated above".

MR. BABINSKI (Poland): Sirs, I would like to support the amendment which was presented by the Polish Delegation. We voted at the preparatory committee, and it was only by a small majority that this amendment was rejected.

In the spirit of conciliation, we don't want to discuss again the first amendment which concerned the obligation of writing out the ticket in two copies. It would perhaps be difficult for the air carriers to change the established way of writing passenger tickets on a counterfoil book in order to conform to another usage which was set up, for example, in sleeping cars, in making out each ticket in duplicate.

Our second amendment asks that there be placed on the ticket the name and address of the traveler. It seems to us that these indications present an interest and utility.

In effect, if one considers the thing not only from the point of view of the travelers but even from that of the carrier, it is perhaps not without interest for the latter to know exactly who the passengers are that he is going to carry, and even their nationality. During the trip, it may be interesting to know with whom one is dealing. And then there is a question presented: That of knowing whether or not the passenger ticket can be transferred. We don't want to impose non-transferability here; but we want to reserve to the carrier the possibility of demanding that the ticket be in someone's name, with the result of its being non-transferable.

Always in the spirit of conciliation, we have prepared a new wording of our amendment. We don't want a particular to be added at letter (e) or (f) as being compulsory. One would be content in inserting in a paragraph (4) a particular providing that on the demand of either the carrier or the traveler, the ticket will be able to be in a person's name and to bear the name and address of the traveler.

It goes without saying that with the sense of this new paragraph and with the drafting which I propose, the omission of this notice would not lead to any santion.

MR. RIPERT (France): I wish to support the amendment of the Polish Delegation. If the indication of the name of the traveler on the ticket were an obligatory notice, this could have some disadvantages, this would be a useless complication. But in its amendment, the Polish Delegation asks simply that the carrier or the traveler be able, one or the other, to demand that the name of the traveler be inserted on the ticket. This can be very important both for the carrier and for the traveler.

The carrier who concludes the contract of carriage with a particular person can have an interest in not seeing another person substituted for this person. Questions of nationality or the morality of the traveler can have some importance for the air carrier, and the carrier can have an interest in demanding that the ticket not be transferable.

Moreover, the traveler can have an interest in not having the ticket be for the bearer, a bearer ticket which can be stolen, but to bear his name and address to serve as proof if needed.

Since the notice would be inserted if one or the other of the parties asks for it, I believe that there would be no disadvantage in accepting the amendment. We would have provided thereby for the legal question which arises: The question of knowing if the ticket is transferable or not. If there is no name, the ticket is transferable; if one or the other party has required notice of the name, it becomes non-transferable.

We thus have a legal solution through this very simple amendment.

MR. RICHTER (Germany): I cannot see the utility of the right of the traveler to ask for a ticket in his name. If the carrier is not disposed to give a ticket in his name, he will always have the liberty of applying Article 31: "Nothing in the present Convention

can prevent a carrier from refusing to conclude a contract of carriage".

I believe, therefore, that this right which we wish to confer on the traveler is not an absolute right. It depends on the good will of the carrier.

MR. DE VOS, Reporter: The Reporter has always the obligation of opposing the adoption of new texts and, in order not to depart from this good habit, I can but support Mr. Richter's words.

The text proposed has no utility. One understands the intention of the Polish Delegation, which believes that the traveler will have a further guarantee in being able to demand that his name be placed on the ticket; but, it was said, it is an illusory guarantee, because if the traveler has his ticket in his pocket, from the point of view of his representative, in the case of accident, there is no guarantee of identity or of documents establishing his status. It must be noted that in practice quite often air carriers write down the name of the traveler. Finally, we don't know in what measure this carriage will multiply: We can find ourselves in the situation of maritime carriage, of rail, even of bus carriage, nowhere in which is the same thing required.

Moreover, one must not forget that by virtue of internal regulations, lists of passengers exist with the air carriers, where one can find bits of information.

From the carriers point of view, I see no utility either; as Mr. Richter said, if the carrier does not want to carry under certain conditions, he is perfectly free by virtue of Article 31, to refuse the contract of carriage.

MR. RIPERT (France): Will you permit me to ask you, Mr. Reporter, if, according to the text of the Convention, the ticket is transferable or not?

MR. DE VOS, Reporter: It is the contract concluded between the parties which will say so. So, too, if the air carrier wishes to carry only known persons, he will say so.

MR. PITTARD (Switzerland): I would like to ask a question.

We have, as regards carriage, a very simple rule. When one takes a railway ticket it is of no concern to the company to know who it carries, and the person who has taken the ticket is not necessarily he who is carried. But the rules is that once the trip has begun, the ticket is non-transferable; there cannot be

several persons benefiting from the same ticket. And as regards carriage by railway, with combined tickets you have this rule which is an indication: It is requested that it be in someone's name, so that it cannot be transferred from one person to another, to prevent private enterprises from recruiting people who would benefit from a very low tariff, because they would resell to them this split-up passage. For one trip, you have a ticket which does not bear the name of the traveler, and for round trips you have the ticket which bears the name of the traveler. This is the principle for railways.

In air matters, I ask the question: When I go to register to assure myself a place in the aircraft, my name is taken; the ticket is written out in my name. Must I appear personally, or may I take a ticket for a third person without giving the name, which can be the case where an employee says simply, "I am reserving a seat for the X company. . ."?

There is great importance in determining this point. You must first of all ask the question: The ticket, is it transferable or not? For me I would say: It is transferable before the trip, but it is not during it.

MR. DE VOS, Reporter: Why?

MR. PITTARD (Switzerland): We must give the public rules which it understands. If you say: It is a question between the air navigation companies and the public, from the administrative point of view, it's very simple, but all lawyers will say to you, "We must enlighten the public, it must not be obliged to go find air carriers to ask them, 'How do you proceed?' " The public is not going to go find the air carrier to ask him, "Give me your general conditions, so that I can see if I am protected!"

It doesn't cost anything to add a line if it is to avoid a misunderstanding. I am disposed to accept the text which provides for transferability or non-transferability of the ticket. For me, it should be transferable before the commencement of the carriage and non-transferable during the course of carriage. All the same, it is necessary that if I want to take a ticket, if I send my associate, I can be replaced. At Geneva the ticket becomes nominative when one boards the plane. It's at this moment that one writes the name on the ticket. There are, therefore, several systems, but in any case one must take one of them.

MR. GIANNINI (Italy): I believe that it is well and good to see what is presently done in practice.

In practice, presently, at least as regards the Italian companies, air carriers have the ticket signed. Moreover one must consider that, for States which are under the regime of the Paris Convention, the companies have the duty of demanding the names of the passengers because they must prepare the list of persons who depart. When a traveler gets on board, he must give his name and the carrier has the duty to demand his name from him. It's a fact of public law.

In practice, in private law, one has the ticket signed. Now here it's a question of providing for the problem.

In committee, we passed on this formula: The traveler can demand the entering of his name and his address on the ticket; the formula was rejected. But I must say that in practice that is of no importance, and I can accept one decision or the other. Fundamentally, given that the companies have the duty to demand the names of the passengers, and given that there is the duty for passengers to give their name, I believe that if we insert the rule requested by the Polish Delegation, there will be no difficulty, and we will unite public and private law; but, practically, I say that the question has no importance.

MR. PITTARD (Switzerland): Excuse me! Not everybody belongs to the CINA.

MR. RIPERT (France): A simple remark: I take it from what has been said that in practice the ticket must be signed.

MR. DE VOS, Reporter: That's an error: The register is signed.

MR. RIPERT (France): There are countries where the ticket is signed; that would become impossible with the Convention, since the name of the traveler is not mentioned.

MR. AMBROSINI (Italy): I would like to add a word. Is it necessary to include in the Convention all possible entries? I think that it is better to provide mere indications and allow practice to develop a little. We are presented with a means of transportation which has just been born; one must allow practice to develop.

MR. PITTARD (Switzerland): Yes, but there is the question of transferability.

MR. DE VOS, Reporter: You do not eliminate it with the Polish Delegation's proposal.

MR. PITTARD (Switzerland): I simply ask the question.

THE PRESIDENT: No one demands the floor on this question?

We are therefore going to pass to a vote on the proposal of the Polish Delegation, addition of the following paragraph:

> Upon the demand of either the carrier or the traveler, the passenger ticket shall be able to be nominative and to indicate the address of the traveler.

A vote by States is asked.

The polls are open.

(Result of vote: FOR—10 votes, AGAINST—12 votes. STATES VOTING FOR: Spain, Finland, France, Greece, Italy, Luxembourg, Netherlands, Poland, Czechoslovakia, Yugoslavia. STATES VOTING AGAINST: Germany, Austria, Belgium, China, Denmark, Egypt, Great Britain, Union of South Africa, Australia, Hungary, Mexico, USSR. ABSTENTIONS: Japan, Switzerland.)

(The proposal is rejected.)

THE PRESIDENT: We pass to Article 4; the Reporter has the floor.

MR. DE VOS, Reporter: The observations presented on Article 4 can be summed up in the three following connections: What are the particulars to be inserted on the baggage check; what are the compulsory particulars; then, the principle of sanction in case of the non-existence of the ticket or of mistake in the particulars to be put on the baggage check.

The committee was in agreement to eliminate the letter (c): "Summary indication of the route to be followed", for the same reasons as those which were presented to you awhile ago, as well as the following: "As well as contemplated stopping places", provided that the baggage check bears the number of the passenger ticket and that the passenger ticket contains the indications in question.

The letter (c) falls, therefore, and the numbering must be, consequently, modified.

The committee eliminated letter (f): "Indication that the ticket is prepared in two copies", considering that this notice is useless.

In contrast, the committee was in agreement in accepting proposals for new particulars which are as follows:

Under letter (f) indication of the number and weight of the parcels.

Under letter (g), indication of the value of the shipment; that is to say, the particular which appears in Article 8, letter (m), "the sum representing the value of the shipment declared conforming to Article 23, paragraph 2".

The committee has deemed that it was preferable to put under letter (h) the following article which imposes the obligation of putting on the ticket a clause stipulating that the carriage is governed by the system of liability set forth by the present Convention.

On the subject of compulsory particulars, the committee decided to reduce these compulsory particulars to a strict minimum, and we have recognized letters (d), (f) and (h) as compulsory. This relates to the third paragraph relative to the sanction for omission of particulars on the check. The last paragraph was not modified like Article 3; that is to say that we have retained the same sanctions in the case of errors in the particulars, however only letters (d), (f) and (h) are now compulsory particulars.

MR. MOTONO (Japan): I would like simply to make one observation that I made in committee.

It is said in the article that delivery is validly made to the bearer of the check.

This validity does not exclude liability in the case of "dol" or of "faute lourde". I believe that this is the interpretation of the conference and that this should be made evident at the time of final wording.

MR. DE VOS, Reporter: That's correct, Mr. Delegate. I thank you for having reminded us of it.

THE PRESIDENT: No one asks the floor on this question? . . .

I put to a vote the proposals of the committee.

(Adopted).

THE PRESIDENT: We pass to the subsequent articles. The Reporter has the floor.

MR. DE VOS, Reporter: On Article 5 there is no observation to be made.

On Article 6 there is a first observation of the German Delegation, which is for the purpose of specifying the values of the copies of the waybill: "Each of these three copies shall have the same value".

So that there be no doubt, we have eliminated the second: "these three copies shall be of the same value". We have added at the first paragraph: ". . . by the consignor in three original copies".

At the third paragraph certain delegations had proposed adding, after the words "signed by the consignor", the words: "or his agent", in considering that we have the words "and the carrier", followed by the words "or their agents".

Other delegations had proposed, on the contrary, eliminating: "or their agents".

We are in agreement on substance: This question concerns the agency relationship, and in order that there be no possible erroneous interpretation, we have eliminated everywhere the word "agent". The words "consignor" and "carrier" cover the person himself and any persons who can act in his name by virtue of any kind of agency relationship.

THE PRESIDENT: There is no opposition. The proposal is adopted.

MR. DE VOS, Reporter: On the same Article 6, there was a proposal of the British Delegation drawn up under the form of a new article, but which, in reality, comes within the framework of Article 6. This proposal, which consisted in establishing a presumption of signature for the account of the consignor, was drawn up thus:

> The signature of the consignor may be affixed by the carrier, acting on behalf of the principal, provided that said carrier has the required authority to do so.

This proposal was withdrawn.

There is another proposal which consisted in adopting Article 39 of the Bern Convention. The committee was in agreement to ally itself with this proposal.

THE PRESIDENT: No one asks the floor on these proposals of the committee? . . .

They are adopted.

MR. DE VOS, Reporter: At Article 7, we have no observations.

For Article 8, the same observations were presented as for Article 3 and 4 as regards the particulars which must appear on the document of carriage.

The letter (c) was modified like Article 3, that is to say that one eliminated: "The summary indication of the route to be followed as well as . . .".

After "the contemplated stopping places", it will be necessary to make an addition to provide for the possibility of modifying these stops.

The particulars "the name and address of the carrier or carriers" was changed and we say: "the name and the address of the first carrier". The reason existing in Article 3 to retain the words "or carriers" does not exist here, considering that recourse for goods is different from recourse for travelers.

At letter (f), certain delegations asked that the question of the waybill drawn to order be expressly examined. As it has been said and repeated several times, the question of the waybill drawn to order has not been examined in a special way by the CITEJA. It's a problem which remains open and which will be considered again as soon as practical experience unfolds.

The words at the end of this passage "if necessary" will be retained in order to indicate that nothing prevents the existence of the order contract.

At letter (g), the last part of the sentence was eliminated, and there remains only the indication of the nature of the goods, which is sufficient for the application of the Convention.

At letter (i) we had a British proposal which consisted in adding "the apparent condition of the goods".

This proposal was accepted. Besides, a non-mandatory particular is involved. At letter (l), following a request from the German Delegation, the text was modified: "If the shipment is made for payment on delivery, the price of goods and, possibly, the amount of the charges".

So that no one mistake the fact that the price of goods and the amount of charges will appear in the text only if the shipment is made for payment upon delivery.

As regards compulsory particulars, there is a modification, as you will see, in replacing letter (g) by letter (i). In the last sentence of the article we have limited the number of compulsory particulars, the other particulars becoming optional.

MR. PITTARD (Switzerland): I regret insisting upon retaining an indication of the route to be followed. Here it's no longer a question of passengers, but of goods which, confided to the carrier, will circulate without surveillance to the destination.

You're not unaware of the fact that there are, as regards goods, customs of carriage in different countries, and it makes some difference to me if I send goods from one country to another to know that they are going to cross such and such country where they can be seized. It can happen this way for certain pharmaceutical products, for saccharin, absinthe, opium. To indicate the route to be followed, that does not mean that one will indicate exactly the air route which will be followed, but the consignor must be able to say, "I don't want to go through this country", and the carrier must be obliged to submit to this prohibition.

We have already seen this regarding railroads; we haven't seen much of it yet regarding air carriage, but I am rather a specialist in carriage matters and I know of cases where goods sent in good faith from Italy to Holland, with the notice, "via Switzerland", have been diverted by France, because there was a convention between the federal railroad and the Companie de L'est (French railroad company), a convention of which no one was aware.

It concerned Michelin tires made in Tourin, and as the law prohibited entry of French goods carrying a French brand when they are not made in France, the tires were seized against the will of the consignor, who had put, "via Switzerland".

If I want to send saccharin to England, I can send it via Belgium or via France and Holland; I know where I may go through. But if the carrier has the goods pass through wherever he pleases, he risks having great damages to pay.

I see no inconvenience in putting "route to be followed", because we always say, as regards air law: One can delay departure, one can modify the contemplated stopping places, but it must be taken into account that besides the carrier there are

consignors who have particular interests, for customs reasons, in passing or not passing by such and such country; I insist in specifying a point which is simply a point of wording: the article must begin by not saying "the waybill contain" but by saying "the waybill must contain". It must be the same for the passenger ticket.

MR. DE VOS, Reporter: This last remark is a simple question of wording. It seems evident to me that one must take the same wording everywhere, and to put everywhere, in all the Articles, "contained", considering that there are optional particulars and that consequently one cannot put "must contain".

As regards the proposal of the Swiss Delegation, I would like to ask our colleague not to insist, considering that we have studied the affair in depth and that in reality we yielded to the objections of practical order raised by the air carriers. All the guarantees which we need can be found in the words "the contemplated stopping places". Provided that there is no stop in any country overflown, there is nothing to be feared from the authorities of this country.

MR. PITTARD (Switzerland): And if there is an involuntary stop, "force majeure" cannot be argued. You have flown above the country where you did not want to fly; you sometimes have several lines which do not pass by the same areas and you indicate that which you choose. You do so for letters and you don't want to do it for goods?

MR. DE VOS, Reporter: Nothing prevents the two parties from making special contracts. If one of these parties has an interest in providing against overflying such a country, he can have it put expressly in the contract.

MR. PITTARD (Switzerland): I ask that it be provided for here.

MR. DE VOS, Reporter: It's possible, but why put it in the Convention?

MR. PITTARD (Switzerland): All air waybills bear, for railroads, "route to be followed", and if you put nothing, the railroad must take the most economical route, but it's provided for. If you provide no particular, it's because it is of no concern to you, but the particular is provided for. Here, this indication is not compulsory, since it appears under letter (c). Then, why

set up a special regime for aircraft, where forbidden countries are overflown or where one risks being obliged to land, when in rail carriage, where the route is known, where a specific route is followed, it has been admitted? It's all the more reason to admit it concerning air routes which are not visable.

I insist in order that this indication appear as optional if you want; if you don't place it in the Convention, the carrier can refuse it to you, whereas if it appears in the Convention, the carrier will not be able to refuse it.

MR. DE VOS, Reporter: In practice, the carriers always indicate the route to be followed and it's in their interest; when they carry and when they go into a country they have great interest in saying to the passenger that he will pass through such and such country when they know it, but they cannot always know it. It's simply an optional notice. You are partly satisfied because that exists in practice.

MR. PRESIDENT: Sirs, if no one asks the floor on this question, we are going to vote on the Swiss proposal which consists in retaining an indication of the route to be followed.

The Swiss Delegation proposes retaining the initial text of letter (c): "summary indication of the route to be followed (via) as well as the contemplated stopping places".

MR. GIANNINI (Italy): "Summary indication of the route to be followed (via) as well as the contemplated stopping places, which can be modified, except in the case of an express provision in the contract."

Except for definitive wording, of course.

THE PRESIDENT: I put this proposal to a vote.

(Adopted).

THE PRESIDENT: The Reporter has the floor.

MR. DE VOS, Reporter: I think I have not understood well. Yesterday, during discussions in committee, I never understood that the particulars indicated at the last sentence were modified and it is absolutely impossible that it be otherwise. If I made an observation to Mr. Pittard, it's because I had maintained my text: The compulsory particulars are those which appear under letters (a) to (e). You cannot say that letters (a) to (e) are compulsory, because we have retained as compulsory the particulars

which allow determining if the carriage is international; how can you determine it if the point of departure and the point of destination are removed?

MR. RICHTER (Germany): I support the Reporter's proposal.

MR. DE VOS, Reporter: It's a question of wording. It is necessary to maintain in the last sentence of Article 8: "the particulars indicated under letters (a) to (i)", and then the vote on the Swiss particulars takes on another meaning, and I am sure that Mr. Pittard is in agreement in recognizing that the indication "route to be followed" must disappear from letter (c) and be placed under a new letter.

MR. PITTARD (Switzerland): I agree.

MR. RIPERT (France): From the point of view of drafting, I believe that the last paragraph of Article 8 must disappear completely.

The article begins by saying: "The air waybill must contain the following particulars". It ends: "the particulars indicated under letters . . . must be compulsorily inserted in the air waybill". In reality all of them are not compulsory, but the same sanction does not apply to all of them: The Convention sets forth what must be placed on the waybill. Now, there is a special text on sanctions. Consequently, this last paragraph serves no purpose, if not to provoke the carrier to non-compliance. I will ask therefore, that we eliminate the last paragraph of Article 8 which can be found precisely in another article, Article 17 of the Convention, which says:

> If, for international carriage, the carrier accepts goods without having drawn up an air waybill, or if the air waybill does not contain all the indications given by Article 8 (a) to (g) inclusive, and by Article 9, the contract of carriage shall nevertheless be subject to the rules of the present Convention, but the carrier shall not have the right to avail himself of the provisions of this Convention which exclude in all or in part his direct liability of that derived from the faults of his servants.

MR. DE VOS, Reporter: I see no disadvantage in accepting the French proposal, all the more since Article 17 provides sanc-

tions for the non-inclusion of compulsory particulars with reference to Article 8.

MR. CLARKE (Great Britain): I believe that there was a proposal to put Article 17 in line with Articles 3 and 8.

THE PRESIDENT: We refer, then, to the drafting committee, but I perceive that Article 8 is accepted.

The Reporter has the floor.

MR. DE VOS, Reporter: On Article 9 there is no observation but this article will perhaps change its place, and will become Article 8.

At Article 10, there was an observation from the Swedish Delegation, not drawn up, which consisted in bringing up again that the sanction was too severe. It was not retained.

THE PRESIDENT: No one demands the floor? . . .

Article 10 is adopted.

MR. DE VOS, Reporter: At Article 11, no observation.

Article 12, there was a proposal from the Polish Delegation tending to specify the case in which the exercises of the right to dispose of the goods is no longer in effect. The amendment was the following:

> The carrier can neither refuse to carry out the orders of the consignor nor delay or change the performance thereof, except in the following cases:
>
> (a) the performance is no longer possible at the time when these arrangements become known to the carrier, or,
>
> (b) the performance is of such a nature as to interfere with the regular service of the operation.
>
> In this case the consignor shall be advised as soon as possible of the obstacles which present themselves to the performance of his orders: The carrier shall have the right to collect the charges which arise from the performance of the orders above-captioned.

The intention of the Polish Delegation was to avoid errors in interpretation of the text and to propose a more precise text.

It seemed to us that this intention for precision did not exist in the opinion of most of the members, and that the sentence: This right can be exercised . . . "inasmuch as the exercise of this right brings no prejudice either to the carrier or to other

consignors, and with the obligation to reimburse the resulting charges" is clearer than the two cases proposed by the Polish Delegation. The sentence "of such a nature as to interfere with the regular service of the operation", is too vague and it could not be retained.

We have, however, retained from the Polish proposal the idea that it will be necessary to advise the consignor as soon as possible of the non-performance of his orders.

There is still a British proposal to specify the meaning of the words "to all interested parties", which is found in the second paragraph.

This proposal can be found at page 4 of the observations of the British Delegation: omission of the words, "to all interested parties", and their replacement by the sentence, "to any person making claims against or through the intermediary of the carrier, by virtue of a transfer or of a legal act the date of which is subsequent to that of the air waybill".

The words, "to all interested parties", were criticized as being too vague and of such a nature as to constitute a pretext for claims raised by the consignee or his subsequent buyers.

There was at the same time a French proposal asking replacement of the words, "to all interested parties", by "the consignee". Almost the same proposal from the Japanese Delegation.

We came to agreement on a text which will be submitted to the drafting committee and which specifies who the interested parties are, who will have the right to act.

MR. MOTONO (Japan): We have specified in the first paragraph of Article 12: the carrier. The carrier must be in possession of an air waybill in order to give the necessary indication.

MR. GIANNINI (Italy): I would like to specify the meaning of the amendment.

The Japanese Delegation asked that the interpretation which it proposed be entered in the minutes.

The delegation proposes adding after the word, "consignor", the following words: "possessor of a waybill". This does not create the obligation of always preparing a waybill, but only makes it necessary for disposition en route.

We are of the opinion to include it, and we think that the Japanese Delegation will thus be satisfied.

THE PRESIDENT: No one asks the floor on this article? . . .

Article 12 is adopted.

The Reporter has the floor.

MR. DE VOS, Reporter: On Article 13 we have no observations.

For Article 14 we had an exchange of views on the subject of the respective rights of the consignor and the consignee. There was, in effect, a proposal from Hungary, from Romania, and from France to replace the word "and" by the word "or". It was decided, for the moment, to maintain the present text, even if we see, in the drafting committee, that it is necessary to modify it. The two interested parties, the consignor and the consignee, can assert their rights which are their own and act one or the other for the account of one or the other, according to their interests.

THE PRESIDENT: There is no observation? . . . The article is adopted.

MR. DE VOS, Reporter: Article 15 gave rise to no observation.

Article 17 is referred to the drafting committee; we replaced letter (g) by letter (i).

At Article 18 we have a proposal from Brazil relating to the retention of documents of carriage for two years. This proposal is thus conceived:

> I will propose as well that the following paragraph be added in connection with the disposition of Article 28 on the period of limitation of the liability action, taken from Article 12 *in fine* of the Italian decree of August 20, 1923:
>
> 'These notices shall be retained by the carrier for two years after the last registration and transcription'.

The committee deemed that this rather concerned the first committee of the CITEJA, and we have asked that this proposal be referred to this committee.

THE PRESIDENT: There is no opposition? . . . Adopted.

MR. DE VOS, Reporter: We come to Article 19. It's a question here of the different models of air carriage documents.

Since practice can change in its details, the Hungarian Delegation had suggested leaving to some organ the task of modifying the models. We could have accepted that, but following an exchange of views, it was found to be more expedient to eliminate this article completely, considering that it contained no obligation, and to present, under the form of a request, the desire to see the formulae drawn up by a special organism designated by the intermediary of the French Government.

MR. GIANNINI (Italy): The proposal is the following: Instead of inserting as annexes to the Convention, the models which will not be part of the Convention, we came to agreement not to eliminate the article, but to make a request in which we recommend adopting the models which were prepared; next, we requested the CITEJA to review periodically these models which we recommend. That is to say that these models will not be part of the Convention, but are recommendations. The request will be formulated, if the conference is in agreement with us to adopt it.

MR. PITTARD (Switzerland): I believe that no one can doubt my attachment to the CITEJA, but we have instructions from our Government not to mention any other organ in the Convention, nor in a request. I will therefore be obliged to abstain. Our Honorable Secretary General knows the interest which I have in the CITEJA, but my Government does not want any other organ to be mentioned. I have very clear instructions, and I warn you against the adoption of a request to which I could not ally myself. Let us not speak therefore, of the CITEJA, which the States ignore, but let's put "to the most appropriate organ"; it's obviously the CITEJA.

MR. RIPERT (France): I admit that I don't understand this systematic disregard of the CITEJA on the part of States which belong to it and which contribute to its maintenance.

There is a Convention, and then models. These models are not compulsory for anyone. The air carriers are free to adopt documents of carriage at their pleasure. If the conference makes a request, it can be only this one: "That the air carriers adopt a uniform model".

What objection can the Honorable Swiss Delegate have, if, instead of leaving to the disposition of the air carriers the choice

of models, we recommend, not to the governments—it is the carriers who intervene—the documents of carriage which will have the approval of the CITEJA? That does not link the Swiss Government to anything, anymore than the French Government. This request is addressed to carriers who, according to the Convention, are completely free and of whom we ask renunciation of a part of their liberty. We could just as well recommend the models of the IATA. If we prefer the CITEJA, it's because it seems to us more independent of particular interests. There is only a request which is concerned with particular interests.

I believe that Mr. Pittard can see no disadvantage in accepting this request.

MR. GIANNINI (Italy): I made the proposal myself as a compromise after a long discussion in committee, and it was approved unanimously. I would like us to have unanimity here as well.

MR. RIPERT (France): We will formulate the request in a manner which specifies our way of thinking.

MR. PITTARD (Switzerland): I make no opposition, I specify a point of view.

THE PRESIDENT: I put to a vote the proposals of the committee amended by the request of Mr. Pittard, except for wording.

(Adopted).

The Reporter has the floor.

MR. DE VOS, Reporter: We pass to Article 20.

The period of carriage commences beginning from the time of embarkation of the passenger on board the aircraft; for goods it's the same formula as that which is presently found in the text: From the moment they enter the aerodome of departure to the moment where they leave the aerodrome of destination, with specifications for the case of forced landing proposed by the British Delegation.

It was asked as well that each State define the limits of an aerodrome but the committee did not think it ought to enter upon this road which went beyond the framework of the present Convention.

There is no observation on this Article? . . .

(Adopted).

MR. DE VOS, Reporter: For Article 21 we have had no substantive observation.

MR. SCHONFELD (Netherlands): It is said in this article that the carrier is liable for all damage sustained during carriage notably in the case of death or injury. But in the two cases the death must occur during carriage?

MR. DE VOS, Reporter: We are in agreement on substance: It is necessary that the death or injury occur during carriage.

MR. SCHONFELD (Netherlands): But if the death occurs one or two days after the end of carriage, it's considered as being sustained during the carriage and I believe, that, in this case, the situation is the same as in the case where the death is sustained during the carriage itself?

MR. DE VOS, Reporter: We have a British proposal on this subject which asks for the omission of the words, "during carriage", in the first line of the text, and for the addition at the end of each of the clauses (a), (b), and (c) the words, "during the air carriage". This proposal seems to us, however, too absolute, but the wording could be modified.

MR. SCHONFELD (Netherlands): You say that the carrier is liable in the case of death or injury: "sustained during carriage". You mean that the death must occur during the carriage?

MR. DE VOS, Reporter: Not necessarily, but if we adopted the English wording, will your observation fall?

MR. SCHONFELD (Netherlands): No, I say that the case where death occurs during carriage is the same as if death occurs some days after the end of carriage.

MR. DE VOS, Reporter: We are quite in accord, and it's for this reason I say that the English proposal goes too far in asking that there be added simply "during air carriage". The accident can occur during the carriage and the death happen afterwards.

MR. AMBROSINI (Italy): I propose eliminating the words "occurred during carriage". The carrier is liable for damage in the case of death or accident, even if the period of carriage has already ended.

MR. DE VOS, Reporter: We are in agreement on substance. It's a question of wording.

MR. RIPERT (France): Couldn't one ask to change the order of the paragraphs, to end the article by the definition of carriage?

MR. DE VOS, Reporter: It's a question which we will consider in drafting committee.

THE PRESIDENT: No one makes any objection? The article is adopted.

MR. DE VOS, Reporter: At Article 22 there is a British proposal which consists in adding a third paragraph thus conceived:

> The liability set forth by Article 21 shall be set aside if the carrier proves that, notwithstanding his own fault or that of his servants, the person injured could have avoided the damage in taking reasonable measures to this effect.

The committee, as regards substance, accepted the idea of it: The drafting committee will put the text into shape.

MR. MOTONO (Japan): I regret having to ask for explanations, but my Government requested me to ask for them on this Article 22 and on the exact meaning of the first paragraph.

Does the paragraph cover, for example, errors of piloting?

MR. GIANNINI (Italy): Given that we still have the drafting committee and that the Delegate from Japan belongs to it, he will see if the wording is clear, and if he finds that there are still some doubts, we will talk it over.

MR. MOTONO (Japan): I have a mandate to ask specifications from the conference.

THE PRESIDENT: We will read the draft a third time in plenary conference.

MR. MOTONO (Japan): Yes, but I am obliged to obtain explanations before hand.

MR. DE VOS, Reporter: Now that we have eliminated the last part of the first paragraph of Article 22, it indeed seems that the drafting committee will have to reread the complete text.

There is a presumption of fault on the part of the carrier. The carrier is exonerated from liability in proving that he has taken

all the reasonable measures or that it was impossible for him to take these measures.

MR. MOTONO (Japan): For travelers and goods?

MR. DE VOS, Reporter: For the two of them; it's the principle.

MR. MOTONO (Japan): That covers errors of piloting?

MR. DE VOS, Reporter: With the reservation of Article 2 which says:

> In carriage of goods and baggage, the carrier shall not be liable for errors of piloting, of flying of the aircraft, or of navigation if he proves that he himself took the reasonable measures to avoid the damage.

There is here a nuance which we must clarify.

MR. MOTONO (Japan): There is double meaning.

MR. DE VOS, Reporter: No, not necessarily. There are reasonable measures which the carrier can take and there are measures which the pilot can take.

MR. MOTONO (Japan): What do you mean by "reasonable measures"?

MR. DE VOS, Reporter: This expression, which has a more precise meaning in Great Britain than on the continent, will be interpreted by the judge according to the case.

MR. MOTONO (Japan): Do you mean to say that the fact of hiring a capable pilot suffices?

MR. DE VOS, Reporter: It's a question of interpretation. The drafting committee will perhaps be able to specify the meaning of this expression.

MR. MOTONO (Japan): I would be of the opinion that it should be clarified. I thank you.

THE PRESIDENT: No one asks the floor? . . . The article is adopted, except for wording.

The Reporter has the floor.

MR. DE VOS, Reporter: We have discussed the economic side of Article 23, and there is a modification which we have decided to bring to our text, following the French proposal. It is necessary to put at paragraph 3: 5,000 francs, even if the definition for the gold franc must be reexamined in the drafting committee.

THE PRESIDENT: There is no opposition. (Adopted).

MR. DE VOS, Reporter: Articles 24 and 25 gave rise to no observation.

At Article 26 the Czechoslovak Delegation observed to us, with much sense, that we had provided only for the use of one line by one company and not carriage by a private person. It is necessary therefore to modify the text slightly at the second and third lines to provide for the domicile of the carrier.

At the second paragraph, there was a Japanese proposal and a British proposal to eliminate this provision, and the committee allied itself with this point of view after a long exchange of views.

There was a British proposal consisting in adding a paragraph to say that the courts had the right not to act when certain provisions could be contrary to rules of law of the country. The British Delegation did not insist.

We have eliminated the last part of the sentence: "no particular formality or security can be demanded".

The British Delegation had asked that one apply this provision in taking nationality and not residence as a criterion; it was decided not to enter into questions of procedure, but rather to eliminate this addition.

MR. RICHTER (Germany): I ask to make a proposal that I am obliged to submit to you. As it is very simple, I will perhaps be able to present it to you.

Article 26 provides the courts before which the liability action may be instituted and leaves the right to choose these courts. We are of the opinion that it would be good to specify that this right to choose the courts will be able to be exercised one time only. If the plaintiff has instituted an action before a court, and if he withdraws it, one cannot give him the right to act before another court.

Our proposal would tend to say, according to the Bern Convention: "Suit having been instituted, the right of choice is extinguished" . . . (Article 42 of the Bern Convention, Section 2, third paragraph).

MR. DE VOS, Reporter: I see no disadvantage in accepting the German proposal.

THE PRESIDENT: There is no opposition? The article with the German amendment is accepted.

MR. WOLTERBEEK-MULLER (Netherlands): Was a security bond eliminated?

MR. DE VOS, Reporter: Yes, for questions of procedure.

MR. WOLTERBEEK-MULLER (Netherlands): The injured person may decide not to choose his own court: Why has this elimination been made?

MR. AMBROSINI (Italy): The Italian Delegation must make a reservation. Since we put aside questions of procedure, all of them must be eliminated. In any case, in the drafting committee we shall see.

MR. PRESIDENT: This is another question. Mr. Wolterbeek-Muller asks the reasons for the elimination of a part of the last paragraph: "However, no particular formality or security bond can be demanded from the plaintiff, etc . . .".

MR. GIANNINI (Italy): The question was raised in committee. The problem was presented thus:

The British Delegation observed that, according to English law, the security bond is asked not only of a foreigner who has no domicile in England, but also of an Englishman who has no domicile in England. One asked therefore, a security bond even from an Englishman who has no domicile in England. Then, to cover all these hypotheticals, one should say: "by reason of his nationality or his domicile".

But the committee wondered, if, in a Convention which must provide only for the air question, it was necessary to insert a rule which is one of general order, and it thought that it was better to leave aside all problems of general order.

This rule would be very useful, but it would be isolated in a system of procedure, because, in all the other questions, we accept the principle of nationality.

THE PRESIDENT: You don't insist? . . . No one asks the floor?

The article is adopted. We pass to the following article.

MR. DE VOS, Reporter: At Article 27, we have no observation.

MR. SCHONFELD (Netherlands): I must support the observation which was presented by the Romanian Delegate:

> The Romanian Delegate believes it more equitable not to put on the same ground the case of non-apparent damages and that of mere delay which can be resolved at the time of the taking into custody of the goods. The Romanian Delegate proposes therefore the elimination of the words 'or of delay'.

What reason is there to put the case of non-apparent damage on the same footing as that of delay? When my trunk arrives on time, I am asked if I accept it. I see the trunk, there is no apparent damage, I accept it. My trunk arrives one day or two days later; it is presented to me, I accept it. For what reason has the case of non-apparent damage been put on the same footing as that of delay?

MR. DE VOS, Reporter: We made the day before yesterday, a discrimination between the two situations and we have adopted different periods for damage and delay. We will take account of your observation. We saw the day before yesterday, that, in effect, it was not the same situation and that it was necessary to make a difference.

MR. SCHONFELD (Netherlands): The two situations have no relation to each other.

MR. DE VOS, Reporter: Yes, but the drafting committee is going to separate the two things.

MR. SCHONFELD (Netherlands): Yes, but the case of delay does not give the right to demand indemnification if there is no damage for the simple reason that there is a delay. But if one puts the two cases together, apparent damage and non-apparent damage with delay, I no longer understand.

MR. DE VOS, Reporter: This article does not provide for liability in the case of delay; it merely provides the period in which it is necessary to protest. Liability is fixed by Articles 21 and following.

THE PRESIDENT: Does someone still ask the floor on this article? . . .

No one asking the floor further, the article is adopted.

We continue.

MR. DE VOS, Reporter: At Article 28 the committee retained the proposal of the Italian Delegation which considers that the *lex fori* makes the legal situation of the carrier too uncertain.

The Italian Delegation proposes therefore to eliminate the paragraph:

> The method of calculating the period of limitation, as well as the causes of suspension and of interruption of the period of limitation, shall be determined by the law of the court having jurisdiction.

And to replace it by: "The liability action must be instituted under pain of forfeiture, within a period of two years".

MR. GIANNINI (Italy): This was already done in plenary session.

MR. DE VOS, Reporter: Yes, but in eliminating the second paragraph we were going too far, and, upon the proposal of the French Delegate, we decided that it was better to maintain the decision by virtue of which the law of the court having jurisdiction, dealt with in Article 2, determines the moment when the action begins.

MR. RIPERT (France): It is evident that one determines at the same time the periods of interruption and of limitation. We are in agreement in substance.

THE PRESIDENT: There is no opposition.

The article is adopted.

MR. AMBROSINI (Italy): The Convention does not provide for the case of non-execution of the contract of carriage. The conference will have to provide for it. It is necessary to know if one must apply the Convention or not, that is to say, the system to which the case of non-execution will have to be submitted.

MR. DE VOS, Reporter: It's the national law which governs this case.

MR. GIANNINI (Italy): That is to say that in the case of total non-execution, the Convention does not apply.

MR. RIPERT (France): What does "total non-execution" mean? The case where a contract of carriage, having been concluded, the goods are not delivered, or the carrier has refused them? I agree. But, total non-execution of carriage, that corresponds to the case of goods lost.

It's not the words "total non-execution" that one must find, it's another expression.

MR. AMBROSINI (Italy): The other cases are provided for in the Convention. Goods are delivered to the aerodrome and the carrier refuses to ship them.

MR. RIPERT (France): Then, you want to provide for the case where the carriage, by mistake, does not occur. Then, it's national law which intervenes.

MR. AMBROSINI (Italy): It should be so said. This can be referred to the drafting committee.

MR. YOUPIS (Greece): I excuse myself for returning to a question which has already been discussed, but I was not fully conscious of the objection of the Delegate from the Netherlands as regards the security bond provided for by Article 26: "No particular clause or security bond can be required from the plaintiff . . .".

I find it to be a very important clause.

Suppose a passenger who takes an aircraft to go from one country to another is injured. He is obliged to have recourse in a court of another country; in this case, he will post a security bond. I believe that in this case it would be fair to exempt him from this security bond, which would be probably quite high to prevent him from having recourse to a foreign court. There has been no vote, I believe, on this question; I ask if one could not vote.

It was objected that according to English law it's not nationality which comes into play but domicile: One can include both and the formula can cover all cases, as much from the point of view of Continental law as from the point of view of British law.

I ask if it is possible to vote on this question.

THE PRESIDENT: I believe that the question was discussed.

MR. YOUPIS (Greece): You are right from the point of view of form, but as I find that this question is very important, I ask that if it is not possible to reconsider the decision. If the majority is against my proposal, I will yield, but I believe that one should vote, because I think that several delegations are of my opinion.

MR. GIANNINI (Italy): In a few words, here is the situation. The problem has no interest for States signatory to the Hague Convention. In the last Hague Convention, we made great effort to broaden the procedural convention. A broadly open protocol was prepared which will allow many States to belong.

Therefore, for States belonging to the Convention, the question has no importance; for States which will be able to sign the Convention, it has no importance either. There are also the bilateral conventions. Finally, there is a question of methodology: One can, in a particular convention, treat problems like this one?

We have decided that we would put in our Convention only matters strictly necessary for a convention on private aeronautical law. For what reason should we make a particular rule here for the security bond?

If one wants to present all the problems, so be it; but why provide for the question of the security bond and not the others?

I believe that it is necessary to decide whether or not this question must be treated, and I ask you to put it to a vote or at least to put the question on the record.

MR. SABANIN (USSR): Since the question is broached, I ask that one proceed to a vote, and I indicate to Mr. Giannini that in the Bern Convention the question is treated in Article 45.

MR. GIANNINI (Italy): There is also the question of judgments.

MR. MOTONO (Japan): I must say that for us, who have not ratified the Hague Convention, the question is quite important.

SIR ALFRED DENNIS (Great Britain): If I understand this proposal well, we would not have the right to impose conditions on the plaintiff? This would be quite contrary to our procedure and we could not accept it.

We have always followed in this Convention the principle that questions of procedure would be left to national courts, and it is difficult to impose a special law in a convention of general order.

MR. RICHTER (Germany): My Government deems that an international regulation of the question of the security bond is not acceptable, if this rule does not bear upon all nations. Consequently, one should provide for or prohibit the security bond, not only for plaintiffs of a foreign nation, but also for the case where the plaintiff would have his domicile in another country. The second question that one should provide for is that the judgment which dismisses the plaintiff be enforceable in all other countries for the court costs; but as it seems impossible to obtain a majority for any rule whatsoever, we have asked to vote in the elimination of the paragraph in question.

MR. PITTARD (Switzerland): This is exactly what I was going to say. If one admits Mr. Youpis' principle, I ask the insertion of the exequator for the execution of judgments in foreign countries, as it is said in the Bern Convention.

Either the Bern procedure or nothing at all.

MR. RIPERT (France): It seems indeed that there is therein a question which cannot be resolved by a simple majority. If all the delegates could accept this provision, it would be preferable, but since everyone doesn't have the mandate to accept it, it is better to let it fall. There are points for which one can yield before a majority, but there, if we have no unanimity, we will have nothing.

MR. GIANNINI (Italy): I would like to draw the attention of the conference to the importance of the decision which we are going to take.

One should not compromise the success of the Convention for this question. We all know, because we worked at the Hague, with what difficulty we were able to reach an agreement which still requires much effort to be accepted.

We are here to make an effort in favor of air navigation; we must do everything possible in order not to compromise the agreement. I will content myself with having a convention of aeronautical law, and I implore the conference not to insist on this point, because, as Mr. Ripert said, one cannot adopt these solutions by a simple majority. If I had the impression that we could come to unanimity, I would say to you: Yes; but I have the contrary conviction.

I implore the conference to limit itself to a convention of private aeronautical law.

THE PRESIDENT: No one asks the floor further? . . .

We are going to pass to a vote. The vote by States is asked.

The Assembly is consulted on the point of knowing if it intends to retain the decision reached previously: Elimination of the last sentence of the last paragraph of Article 26 relating to the security bond.

The vote is open.

(Result of vote: FOR THE ELIMINATION of the sentence—21 votes, FOR THE RETENTION—3 votes. STATES VOTING FOR RETENTION: Greece, Netherlands, USSR.)

THE PRESIDENT: I ask the Reporter to resume his expose at the place to which we had arrived.

MR. DE VOS, Reporter: We were at Article 29: it raised no observation.

For Article 30 we had a proposal from the Japanese Delegation which provided for the option of derogating from the rules of competence, and which was thus conceived:

> The Japanese Delegation deems that it is necessary to recognize the validity of a prior agreement between parties as regards competence, and proposes therefore, to eliminate the last part of the first sentence beginning with: 'or by a modification of the rules of competence'.

The committee deemed that it could not follow the Japanese Delegation in this proposal; but the Japanese Delegate asked that the question be discussed in plenary session.

I would indeed like him to defend this question himself.

MR. MOTONO (Japan): The Japanese Government considers that this freedom accorded to the parties is a principle of law, and it's in this spirit that we ask modification of this article, and we implore you to put it to a vote.

It's a question of deciding on the retention or the elimination of the words "or by a modification of the rules of competence".

One could add a clause indicating, at the last line of the article: ". . . courts other than the courts provided for by the Convention".

MR. RIPERT (France): In order that the Japanese Government be enlightened on the debates of this conference, it is not useless to point out that the absolute freedom of choice of a

competent court leads in fact to the suppression of the Convention. It would be enough that there be a clause granting jurisdiction to a court of a non-contracting country so that this country not have to apply the Convention, and not only could the carrier bring the plaintiff before any court which would please him, but also he could fix the court of a non-adhering country and thus take himself out of the provisions of the Convention.

We hope that the Japanese Government will not insist when it becomes familiar with the provisions of the Convention.

THE PRESIDENT: No one asks the floor? . . .

We are going to pass to a vote.

(The Japanese proposal is rejected.)

THE PRESIDENT: Mr. Reporter, please continue.

MR. DE VOS, Reporter: In Article 31 there are simply certain conditions concerning additional articles which were proposed by certain delegations. There is no observation.

THE PRESIDENT: No one asks the floor? . . .

The Article is adopted.

MR. DE VOS, Reporter: We have an article proposed by the Czechoslovak Delegation as an additional article:

> In the absence of provisions in the present Convention, the provisions of laws and national rules relative to carriage in each State shall apply.

I want to remark that this was provided for: Provided that the case which arises was not provided for in the Convention, it's the common law which is applicable.

I believe therefore, that this provision would be of no use.

MR. GIANNINI (Italy): It was withdrawn.

MR. DE VOS, Reporter: There were two proposals, one from the Czechoslovak Delegation which consisted in applying national law for cases not provided for by the Convention, and then a proposal of the Yugoslav Delegation which concerned the application of the Bern Convention for cases not provided for by the Convention.

MR. GIANNINI (Italy): Following a suggestion made by the German Delegation we are going to propose adopting for the

Convention: "Convention relating to certain rules for the unification of private aeronautical law".

Given that the title indicates the special character of the Convention, the Czechoslovak Delegation no longer insists on its amendment. As to the proposal of applying secondarily the rules of the Bern Convention, it was withdrawn.

THE PRESIDENT: Consequently, the proposals are withdrawn.

MR. DE VOS, Reporter: There is only the wording proposal, concerning the wording of the title.

MR. AMBROSINI (Italy): Then, for the special case that I have brought up, it's the drafting committee which will deal with it as well.

MR. RIPERT (France): There is an additional article proposed by the French Delegation on exceptional carriage which was accepted.

MR. GIANNINI (Italy): There is as well a British proposal to specify that working days and not "consecutive" days are involved here. We are in agreement in substance; it's a question of wording.

There is another proposal from the Delegation from the USSR upon which I draw your attention:

It concerns knowing if we consider that the signature will be final at the moment of the signature of the protocol, or if we want to leave the Convention open.

The Delegation from the USSR proposes leaving the protocol open during a certain period of time to all States who were not represented at the conference.

MR. SABANIN (USSR): No, only to participating States.

MR. GIANNINI (Italy): We must make this clear: for States represented here?

MR. SABANIN (USSR): For States represented here only.

MR. GIANNINI (Italy): I ask the conference if we are in agreement on this point.

MR. BABINSKI (Poland): I see no objection in substance to the proposal of the Delegation from the USSR, that is to say, that one put beside the adherents, the signatory States, but I would like to reserve this question for the drafting committee, for reasons of the technical side of the thing, because the proposal of the Delegation from the USSR will necessitate the reworking of the preamble.

MR. GIANNINI (Italy): There is another question. The problem has been raised of knowing if it is necessary to set forth the option of revising the Convention on the demand of some States, or if it's necessary to provide for periodic revision at fixed dates.

The committee, in accord with colleagues who made the proposals in this sense, proposes to the conference not to provide for periodic revision at fixed terms.

First of all, we don't know when this first Convention will enter into force. Next, the revisions which are necessary in certain cases in conventions of private law, are not recommendable, because they lead to modifications, sometimes without result. The CITEJA already gives us a lot of work, and States which are not presently at the CITEJA could ask to revise the work done.

The committee therefore decided to accept the formula presented by the Polish Delegation:

> Each State which is party to the Convention shall have the option of convening a new international conference for the purpose of seeking improvements which could be brought to the present Convention. It shall address itself for this purpose to the French Government, which will take the necessary measures in order to prepare this meeting.

THE PRESIDENT: Does anyone have any observation to present on this proposal? . . .

It is adopted.

MR. PITTARD (Switzerland): Why not leave the Convention open? All those who are here can sign, but I don't see the possibility of making a closed Convention.

MR. SABANIN (USSR): It will be open.

MR. PITTARD (Switzerland): It will be open to those who are not represented here?

THE PRESIDENT: We are in agreement.

MR. BABINSKI (Poland): The Convention will first of all remain open up to a certain date in order to permit States repre-

sented here to sign even later on, then all the States can adhere to the Convention.

THE PRESIDENT: Sirs, we have finished our work as regards the second step: examination of definitions proposed by the preparatory committee. I am happy to ascertain that we are almost at the end of our work, because I am persuaded that the work of the drafting committee will go very quickly.

I propose to you to convene the plenary conference tomorrow afternoon, because I don't believe that the drafting committee can finish its work sooner than that.

I ask Mr. Giannini's opinion.

MR. GIANNINI (Italy): I would like very much to make every effort to hasten the end, but the preparatory committee has worked so hard that we all are a little tired.

I believe that everyone is in agreement to thank our Reporter one more time, because he has done an enormous work.

Under these conditions, I believe that we can finish our work for tomorrow afternoon, but for the plenary session, I propose postponing it to Friday morning.

MR. BABINSKI (Poland): We are approaching the end of the week; we should give the text for printing Friday morning, otherwise we will come to Saturday afternoon where no one works at the print shop. That will delay things. I propose therefore to put off the plenary session to tomorrow afternoon.

MR. DE VOS, Reporter: I am all the more happy with the proposal of Mr. Babinski since I cannot stay beyond Thursday night.

I believe that the best solution is to have a plenary session tomorrow afternoon. Otherwise it is quite probable that we will not have the text before Monday.

THE PRESIDENT: There is no opposition to the proposal of Mr. Babinski? . . .

It is thus decided.

The session is closed.

(The session is closed at 1:15 p.m.)

Secretaries General:
LEBINSKI
E. SUDRE

The President:
LUTOSTANSKI

PRELIMINARY DRAFT OF THE CONVENTION

relating to documents of air carriage and
the liability of the carrier in
international carriage by aircraft,

adopted by the CITEJA
during its Third Session in May, 1928.

CHAPTER I
Object—Definitions

Article 1

The present Convention shall apply to international carriage of passengers, goods and baggage performed by aircraft for remuneration or by an air carrier with or without remuneration.

For the purposes of this Convention, the expression "international carriage" shall mean all carriage in which, according to the stipulations of the parties, the point of departure and the point of destination, whether or not there be a break in the carriage or transshipment, are situated either within two Contracting States, or within a same Contracting State if a stop is provided for in another State, even though it not be a Contracting State.

Carriage envisaged as a single operation under the form of a single contract or a series of contracts to be performed by several successive air carriers shall be deemed, for the purposes of this Convention, to be a single carriage, and shall not lose its international character by the fact that a single contract or a series of contracts is to be performed entirely within the same State.

In the case of combined carriage performed in part by air and in part by any other mode of carriage, the stipulations of the Convention shall apply only to those portions of carriage to be performed by air if the latter fulfill the conditions of paragraph 2.

Article 2

The Convention shall apply to carriage performed by the State or by the other legal entities of public law under the conditions provided for Article 1.[1]

This Convention shall not apply to carriage performed under the terms of international conventions.[2]

CHAPTER II
Documents of Carriage

Section I—Passenger Ticket

Article 3

In the carriage of travelers the carrier shall be required to deliver a passenger ticket which shall contain the following particulars:

(a) the place and date of issue;

(b) the points of departure and of destination;

(c) summary indication of the route to be followed (via) as well as the contemplated stopping places;

(d) the name and address of the carrier or carriers.

The passenger ticket shall contain, moreover, a clause stipulating that the carriage is subject to the system of liability set forth by the present Convention.

The absence, irregularity, or loss of this document of carriage shall not prejudice either the existence or the validity of the contract of carriage.

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1 The following English reservation will appear in the closing protocol: "The British Government reserves the question of the application of the Convention to aircraft belonging to the State, including the organs of the central government who enjoy, according to English law, the prerogatives of the Crown".

2 Translators' note: The word "postales" did not appear in the text from which this translation was made, and we suspect that its omission was through mere error: Therefore, the final phrase should read "of international postal conventions".

If, for international carriage, the carrier accepts the traveler without having drawn up a passenger ticket, or if the ticket does not contain the particulars indicated hereabove, the contract of carriage shall nonetheless be subject to the rules of the present Convention, but the carrier shall not have the right to avail himself of the provisions of this Convention which exclude in all or in part his direct liability or that derived from the faults of his servants.

Section II—Baggage Check

Article 4

In the carriage of baggage, other than small personal objects of which the passenger himself retains custody, the carrier shall deliver a baggage check.

Delivery of the baggage to the traveler shall be validly made to the bearer of the check.

The baggage check shall be made out in duplicate, one part for the passenger and the other part for the carrier.

It shall contain the following particulars:

(a) the place and date of issue;

(b) the points of departure and of destination;

(c) summary indication of the route to be followed (via) as well as the contemplated stopping places;

(d) the name and address of the carrier or carriers;

(e) the number of the passenger ticket;

(f) indication that the check is made out in duplicate;

(g) indication that the delivery of the baggage to the traveler shall be validly made to the bearer of the check.

The baggage check shall contain, moreover, a clause stipulating that the carriage is subject to the system of liability set forth by the Convention.

The absence, irregularity, or loss of this baggage check shall not prejudice either the existence or the validity of the contract of carriage.

If, for international carriage, the carrier accepts baggage without having made out a ticket, or if the ticket does not contain the particulars indicated hereabove up to and including (d),

the contract of the carriage shall nonetheless be subject to the rules of the present Convention, but the carrier shall not have the right to avail himself of the provisions of this Convention, which exclude in all or in part his direct liability or that derived from the faults of his servants.

Section III—Air Waybill

Article 5

Every carrier of goods shall have the right to require the consignor to make out and hand over a document entitled: air waybill; every consignor shall have the right to require the carrier to accept this document.

Nevertheless, the absence, irregularity, or loss of this document shall not prejudice either the existence or the validity of the contract of carriage.

Article 6

The air waybill shall be made out by the consignor in three copies and handed over with the goods.

These three parts shall have the same value.

The first part shall bear the indication "for the carrier"; it shall be signed by the consignor. The second part shall bear the indication "for the consignee"; it shall be signed by the consignor and the carrier or their agents, and it shall accompany the goods. The third part shall be signed by the carrier or his agent, and handed over by him to the consignor after acceptance of the goods.

The signature of the carrier shall be affixed upon the acceptance of the goods.

The signature of the carrier may be replaced by a stamp; that of the consignor may be printed or replaced by a stamp.

Article 7

The carrier of goods shall have the right to require the consignor to make out different air waybills when there are several parcels.

Article 8

The air waybill shall contain the following particulars:

(a) the place and date of its execution;

(b) the points of departure and of destination;

(c) summary indication of the route to be followed (via) as well as the contemplated stopping places;

(d) the name and address of the consignor;

(e) the name and address of the carrier or carriers;

(f) the name and address of the consignee, if the case so requires;

(g) the nature of the goods and the indications necessary for their identification;

(h) the number, the method of packing, the particular marks or numbers on the parcels;

(i) the weight, the quantity, the volume, or the dimensions of goods;

(k)[1] the freight, if it is stipulated, the date and place of payment, and the person who is to pay it;

(l) the price of the goods and, eventually, the amount of charges, if the shipment is made for cash on delivery;

(m) the amount of the sum representing the interest in the delivery, declared conforming to Article 23, paragraph 2;

(n) the number of copies of the air waybill;

(o) the documents forwarded to the carrier to accompany the air waybill;

(p) The period of the carriage, if it has been stipulated;

The particulars indicated under letters (a) through (g), inclusive, must be compulsorily entered in the air waybill.

Article 9

The air waybill shall contain a clause stipulating that the carriage is subject to the system of liability set forth by the present Convention.

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1 Translators' note: There was no letter "j" in the text from which this translation was made.

Article 10

The consignor shall be responsible for the correctness of the indications and declarations concerning the goods which it has inserted in the air waybill.

The consignor shall be liable for all damage sustained by the carrier or any other person by reason of the irregularity, incorrectness, or incompleteness of its indications and declarations.

Article 11

The waybill shall be *prima facie* evidence of the conclusion of the contract, of the receipt of the goods, and of the conditions of carriage.

The statements in the air waybill relating to the weight, dimensions, and packing of the goods, as well as those relating to the number of parcels, shall be *prima facie* evidence of these facts; those relating to quantity, volume, and the condition of the goods shall not constitute evidence against the carrier except insofar as they have been verified by him in the presence of the consignor, and stated in the air waybill, or insofar as they relate to the apparent condition of the goods.

Article 12

The consignor shall have the right to dispose of the goods by withdrawing them at the aerodrome of the departure, or by stopping them en route upon landing, or by having them delivered at the place of destination or en route to a person other than the consignee indicated on the air waybill, or by demanding their return to the aerodrome of departure, provided that the exercise of this right bears no prejudice either to the carrier or to other consignors, and that he shall be obligated to repay the expenses which result therefrom.

If the carrier complies with the orders of the consignor for the disposition of the goods without requiring the production of the copy of the air waybill delivered to him, he shall be liable, without prejudice to his right of recovery against the consignor, for any damage which may have been caused thereby to any interested party.

The right of the consignor shall cease at the moment when that of the consignee shall begin, in accordance with Article 13 below. Nonetheless, if the consignee refuses the air waybill or the goods, the consignor shall retain his right of disposition.

Article 13

Except for the cases indicated in the preceding article, the consignee shall have the right, upon the arrival of the goods at the point of destination, to require the carrier to hand over to him the air waybill and to deliver the goods to him on payment of the charges due and on complying with the conditions of carriage set out in the air waybill and, if the shipment is made for cash on delivery, of the amount which is fixed thereon. Unless it is otherwise agreed, the carrier shall advise the consignee upon the arrival of the goods.

If the loss of the goods is brought to the attention of the carrier or is recognized by him or if, at the expiration of a period of seven days after the date on which they should have arrived, the goods have not arrived, the consignee shall be authorized to exercise against the carrier the rights resulting from the contract of carriage.

Article 14

The consignor and the consignee shall be able to enforce all the rights conferred upon them respectively by Articles 12 and 13, each one in his own name, whether he is acting in his own interest or in the interest of others, provided that he carries out the obligations that the contract imposes.

Article 15

Articles 12, 13 and 14 shall not affect either the relations between the consignor and the consignee or the relations of third parties whose rights are derived either from the carrier or the consignee.[1]

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1 Translators' note: The official French text of the final Convention contains the words "soit de l'expiditeur" and not "soit du transporteur", and thus we believe that this sentence should read "either from the consignor or from the consignee". However, we also note that this apparent error was overlooked during the discussion of Article 15. See discussions, page 204.

Any clause deviating from the provisions of Articles 12, 13 and 14 shall be entered in the air waybill.

Article 16

The consignor shall furnish such information and attach to the air waybill such documents which, before the delivery of the goods to the consignee, are necessary to meet the formalities of Customs, octroi, or police. The consignor shall be liable to the carrier for all damage which could result from the absence, insufficiency, or irregularity of such information and documents except in the case of fault on the part of the carrier.

The carrier shall not be required to inquire if such information and documents are exact or sufficient.

Article 17

If, for international carriage the carrier accepts goods without having made out an air waybill, or if the air waybill does not contain all the indications set forth by Article 8(a) through (g) inclusive, and by Article 9, the contract of carriage shall nonetheless be subject to the rules of the present Convention, but the carrier shall not have the right to avail himself of the provisions of this Convention which exclude in all or in part his direct liability of that derived from his servants.

Section IV—Provisions Common to Documents of Carriage

Article 18

Nothing in the present Convention shall prevent the parties, in the case of combined carriage, from inserting in the document conditions relative to other means of carriage, provided that the provisions of the present Convention be respected as regards the air carriage.

Article 19

A model of the different documents of air carriage is set out in the annex to the Convention, and their adoption is recommended to interested parties.

CHAPTER III
Liability of the Carrier

Article 20

The period of carriage, for the application of the provisions of the present chapter, shall extend from the moment when travelers, goods or baggage enter in the aerodrome of departure to the moment when they leave the aerodrome of destination; it shall cover no such carriage outside the boundaries of an aerodrome other than by aircraft.

All loss, damage, or delay shall be presumed, except where otherwise shown, to have occurred during this period, if in the execution of the contract of air carriage there has been, for the purpose of loading, delivery, or transshipment, carriage performed otherwise than by air.

Article 21

The carrier shall be liable for damage sustained during carriage:

(a) in the case of death, wounding, or any other bodily injury suffered by a traveler;

(b) in the case of destruction, loss, or damage to goods or baggage;

(c) in the case of delay suffered by a traveler, goods, or baggage.

Article 22

The carrier shall not be liable if he proves that he and his servants have taken the reasonable measures to avoid the damage or that it was impossible for them to take them, unless the damage arises out of an inherent defect in the aircraft.

In the carriage of goods and baggage, the carrier shall not be liable for errors of piloting, of flying of the aircraft, or of navigation, if he proves that he himself took reasonable measures to avoid the damage.

Article 23

The liability of the carrier shall be limited to the sum of 25,000 francs per traveler. Nevertheless, through a special agreement with the carrier the traveler shall be able to fix a higher limit of liability.

In the carriage of goods, as well as of baggage, the liability of the carrier shall be limited to the sum of 100 francs per kilogram except in the case of a special declaration of value made by the consignor at the time of delivery of the parcels to the carrier, and on condition of having paid a supplemental tax if the case so requires. In this case, the carrier shall be required to pay the sum declared unless he proves that the sum declared is higher than the real value at the point of destination or than the actual value to the consignor at delivery.

As regards objects of which the passenger himself retains custody, the liability of the carrier shall be limited to 1,000 francs per traveler.

The values hereabove are gold values. They shall be able to be converted into each national currency in round figures.

Article 24

In the cases provided for in Article 21, even in the case of death of the interested party, any liability action, however founded, can be brought only under the conditions and limits set forth by the present Convention.

If the damage arises from an intentional illicit act for which the carrier is responsible, he will not have the right to avail himself of the provisions of this Convention, which exclude in all or in part his direct liability or that derived from the faults of his servants.

Article 25

Any clause tending to exonerate the carrier from his liability or to set up a limit which is lower than that fixed in the present Convention shall be null and void. But the nullity of this clause shall not lead to the nullity of the contract which remains subject to the provisions of the present Convention.

Nothing shall prevent the carrier from formulating regulations which are not contradictory to the provisions of the present Convention.

Article 26

The liability action shall be brought, at the plaintiff's option, in one of the Contracting States, either before the court of the principal place of business or of the place where the carrier has an establishment through which the contract was concluded, or before the court of the place of destination, or, in the case of the non-arrival of the aircraft, of the place of accident.

In the case of death, all suits shall be brought before the first court to have regularly taken jurisdiction.

Questions of procedure shall be governed by the law of the court having taken jurisdiction; nevertheless, no particular formality or security bond can be required of the plaintiff by reason of his nationality.

Article 27

The pick-up of the goods, without protest, by the consignee, shall constitute *prima facie* evidence, that the goods have been delivered in good condition and conforming to the document of carriage. Nevertheless, in the case of non-apparent damage or of delay, the consignee shall have a period of seven days from the receipt of goods to protest to the carrier or to his agent at the place of delivery.

All protest shall be made by reservation inserted on the document of carriage or by another writing sent within seven days from receipt of the goods.

The same presumption and the same periods of protest shall apply for delivery of the baggage to the traveler.

Article 28

The liability action shall be instituted within a period of two years counted from the arrival at the destination or from the date on which carriage stopped.

The method of calculating the period of limitation, as well as the causes of suspension and interruption of the period of limi-

tation, shall be determined by the law of the court having taken jurisdiction.

Article 29

In the case of carriage governed by the definition of the third paragraph of Article 1 to be performed by several successive carriers, each carrier who accepts travelers, baggage, or goods shall be subject to the rules set forth by this Convention, and shall be deemed to be one of the Contracting Parties to the contract of carriage, insofar as the contract involves that part of the carriage which is performed under his control.

In the case of such carriage, the traveler or his representative shall be able to have recourse only against the carrier who performed the carriage during which the accident occurred, except for the case where, by express stipulation, the first carrier assumed liability for the whole journey.

In the case of goods or baggage, the consignor shall have recourse against the first carrier and the consignee who is entitled to delivery shall have recourse against the last carrier and, moreover, each may act against the carrier having performed the carriage during the course of which the loss, damage, or delay occurred. These carriers shall be jointly and severally liable to the consignor and the consignee.

CHAPTER IV
General Provisions

Article 30

Any clause contained in the contract of carriage and all special agreements entered into before the damage occurred, by which the parties deviate from the rules of the present Convention, either by a determination of applicable law or by altering the rules of jurisdiction, shall be null and void. Nevertheless, arbitration clauses shall be allowed, subject to the present Convention, when the arbitration is to take place within the jurisdictions provided for in Article 26, paragraph 1 hereabove.

Article 31

Nothing contained in the present Convention shall prevent the carrier from refusing to conclude a contract of carriage.

II

PROPOSALS OF AMENDMENTS SUBMITTED TO THE WARSAW CONFERENCE

preceded by the report of the preparatory committee instituted by the conference.

A.

PREPARATORY COMMITTEE

Proposals on the Order of Discussion

The committee, after having analyzed the various amendments presented by the different delegates, has deemed it oportune to retain in the first place the amendments touching questions relating to the very essence of the draft of the Convention and for which certain delegates would eventually have to ask instructions from their Governments.

These essential questions can be grouped under four headings:

I

Those which concern the theory of the system of liability:

(a) Japanese amendment: reservation of national laws on the system of liability, (Article 25).

(b) British, French and Soviet amendments: liability in the case of errors of piloting in the carriage of passengers, (Article 22, paragraph 2).

(c) British, French and Swedish amendments: exclusion of inherent defect of the aircraft, (Article 22, paragraph 1).

(d) British, German, Polish and Hungarian amendments: liability in the case of delay, (Article 21, (c)).

(e) German amendment: gross negligence of the carrier likened to willful misconduct, (Article 24, paragraph 2).

(f) French and British amendments: distinguishing personal fault of the carrier from that of his servants, (Article 24, paragraph 2).

II

Scope of liability:

(a) German, Italian, British, Brazilian, Hungarian and Soviet amendments: definition of the period of carriage, (Article 20, paragraph 1).

(b) French amendment: case of exceptional carriage, (New Article).

III

Limitation of liability:

French amendment: reduction of the figure for goods, (Article 23, paragraph 2).

IV

As to the liability action:[1]

(a) British, Hungarian amendments: questions of delay as regards the period for protest, (Article 13).

German, British, French, Japanese amendments:[2] period of time as regards the period for protest, (Article 27, paragraph 1).

British, French and Japanese amendments on paragraph 2.

(b) Italian amendment: replacement on the principle of prescription by that of plea in bar, (Article 28, paragraph 1).

(c) British amendment: effect of the pick-up of goods without protest, (Article 27, paragraph 1).

(d) British amendment: competence of the place of accident (Article 26, paragraph 1).

(e) German amendment: elimination of the option of arbitration, (Article 30).

(f) British amendment: recourse against successive carriers, (Article 29, paragraph 3).

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1 See also: Minutes of the sessions, page 116—German amendment relating to Article 26.

2 See also: Minutes of the sessions, page 97—Swiss amendment relating to Article 27.

Analysis of the Amendments

Title of the Convention

Proposal from the Delegation from the USSR and proposal from the German Delegation: the referring to the drafting committee is proposed.

Preamble

Polish and British proposals to be referred to the drafting committee.

Article 1

Paragraph 1:

British proposal: "The present Convention shall apply to any international carriage of passengers, goods and baggage performed by aircraft for remuneration. The Convention shall also apply to free carriage performed by aircraft by an air transport company". [Question of wording.]

Japanese proposal (omission of the words "by aircraft for remuneration or not"). [Question of substance (2).]

Paragraph 2:

British proposal (special situation of the Empire) in relation to the Polish proposal, letter (d). [Question of substance (2).]

Paragraph 3:

British proposal linked to the question envisaged by the previous paragraph.

German proposal. [Question of wording.]

Paragraph 4:

British proposal. [Question of wording (in relation to the provisions of Article 20).]

Additional paragraph:

Brazilian proposal (definition of the carrier). [Question of substance (2).]

For the record: Eliminate from the last line of the third paragraph the word "which".

Article 2

For the record: Add after the word "convention" at the last line, the word "postal".

The Czechoslovakian and German observations which had been presented, disappear by virtue of this correction.

Article 3

Paragraph 1:

Polish proposal. [Question of substance (2).]

Letter (c): German, British and Hungarian proposal. [Question of substance (2).]

Letter (d): Italian proposal. [Question of wording.] German and British proposal. [Question of substance (2).]

Letter (e) additional: German and Czechoslovakian proposals, (cost of carriage). [Question of substance (2).]

Letter (f) additional: Polish and Brazilian proposal (indication of the traveler). [Question of substance (2).]

Paragraph 4:

Japanese proposal with regard to the last paragraph of Article 4—It shall be necessary to take up the same general wording formula.

Greek proposal (sanctions). [Question of substance (2).]

German proposal. [Question of wording.]

Article 4

Paragraph 4:

Letter (a): British proposal (elimination). [Question of substance (2).]

Letter (c): British, German and Hungarian proposal (elimination). [Question of substance (2).]

Letter (d): Italian proposal. [Question of wording.] German proposal (elimination). [Question of substance (2).]

Letter (f): British proposal (elimination). [Question of substance (2).]

Letter (h) additional: Swiss and German proposals (addition of the number of parcels, etc. . .). [Question of substance (2).]

Letter (i) additional: German proposal (interest in the delivery). [Question of substance (2).]

Letter (l) additional: German and Czechoslovakian proposal (cost of carriage). [Question of substance (2).]

Paragraph 5:

German proposal. [Question of wording.]

Last paragraph:

Japanese proposal (see Article 3, last paragraph).

Second Japanese proposal (compulsory particulars). [Question of substance (2).]

Swiss proposal (new compulsory particulars). [Question of substance (2).]

Greek proposal (see Article 3). [Question of substance (2).]

Article 5

Hungarian proposal. [Question of substance (2).][1]

Article 6

Paragraph 3:

German proposal (value of the copies). [Question of substance (2).]

British, Japanese and German proposals (agency question). [Question of wording.]

Second British proposal and Hungarian proposal (delivery of the document to the consignor upon his request). Last additional paragraph to Article 6.[1] [Question of substance (2).]

Article 6 bis

New article proposed by the French Delegation, and linked to the additional Article 6 of the British Delegation (presumption of signature on behalf of the consignor). [Question of substance (2).]

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1 Corrected during the session after the distribution.

Article 8

Letter (c): German, British and Hungarian proposal: (see Articles 3 and 4). [Question of substance (2).]

Letter (d): Brazilian proposal: Add the name and the address of the agent. [Question of substance (2).]

Letter (e): French proposal accepted by the British and German Delegations: put "of the first carrier". [Question of substance (2).]

Letter (g): Swiss proposal: Strike out the paragraph after "the nature of the goods". [Question of substance (2).]

Letter (i) bis: Swiss proposal. [Question of substance (2).]

Letter (i) ter: British proposal. [Question of substance (2).]

Letter (l): German proposal. [Question of substance (2).]

Letter (e): Hungarian proposal: Add the name and address of the consignor. [Question of wording.]

Letter (f): Hungarian proposal: Elimination of "if it is necessary". [Question of wording.] Swedish proposal: the waybill drawn to the bearer. [Question of substance (1).]

Last paragraph:

Brazilian proposal: Add the reservation "without prejudice to the regulation of each State of the bills of lading, manifests and any other documents for carriage of goods". [Question of substance (1).]

German, Italian, Swiss proposals on compulsory particulars. [Question of substance (2).]

Article 10

Swedish proposal not drawn up. [Question of substance (2).]

Article 11

Paragraph 2:

German proposal: Add the word "packing" after the word "condition". British proposal: Eliminate the word "packing". [Question of wording.]

Italian proposal. [Question of substance (2).]

Article 12

Paragraph 1:

Czechoslovakian proposal. [Question of wording.]

Polish proposal. [Question of substance (2).]

Addition: proposed by the British Delegation. [Question of wording.]

Japanese proposal on the requirement of a waybill. [Question of substance (2).]

Paragraph 2:

British proposal on the interpretation of the words "to all interested parties"; German proposal in the same sense. [Question of substance (2).]

Paragraph 3:

Czechoslovakian proposal on the recovery of the goods by the consignor. [Question of substance (2).]

Article 13

Last paragraph:

British, Hungarian, Swiss proposal on the question of the period of time. [Question of substance (1).]

Paragraph 3:

Proposal made in session by the Japanese Delegation to put "by the carrier" instead of "to the carrier". Proposal backed by the British Delegation. [Question of wording.]

Article 14

French and Hungarian proposal on the double action of the consignor. [Question of substance (2).]

Article 16

Paragraph 1:

British proposal: Add "or his servants". [Question of wording.]

Article 17

Italian proposal. [Question of substance (2).]

For the record: Revision of the last line of the text for addition of the word "errors".

Article 18 bis

Brazilian proposal drawn up regarding Article 13 on the retention of the documents for two years. [Question of substance (2).]

Article 19

Hungarian and French proposals concerning the models of the documents. [Question of substance (2).]

Swiss proposal on the distinction of models. [Question of substance (2).]

Article 20

Paragraph 1:

Brazilian, British, Hungarian, Swiss and Soviet proposals on the period of carriage. [Question of substance (1).]

Italian proposal. [Question of wording.]

Paragraph 2:

German proposal: Elimination of the words "any loss or delay". [Question of wording.]

British proposal. [Question of substance (2).] (To be added to the second paragraph, or make a new Article 20 bis.)

Article 21

British proposal: Elimination from the first line of the words "during the carriage" and add them after (a), (b), (c). [Question of wording.]

Letter (b): German proposal: Add the word "checked" after the word "baggage".

Letter (c): British proposal: Add "except as otherwise agreed".

For the record: See the German observation at Article 25. [Question of substance (1).]

Polish proposal: Elimination of the word "traveler". [Question of substance (1).]

Article 22

Paragraph 1:

British, French, and Swedish proposal: Elimination of the last part of the paragraph. [Question of substance (1).]

Soviet proposal presented in committee: "In the first paragraph put the words 'all necessary measures' instead of 'the reasonable measures' ". [Question of wording.]

Italian proposal on the inherent defect of the goods. [Question of substance (1).]

Paragraph 2:

Soviet proposal presented in committee: Elimination of the paragraph. [Question of substance (1).]

British proposal. [Question of wording.]

French proposal: Elimination of the first part of the paragraph up to "the carrier". [Question of substance (2).]

British proposal for the addition of a third paragraph. [Question of substance (1).]

Danish proposal for the addition of a third paragraph in relation to Articles 4 and 21. [Question of wording.]

Article 23

Paragraph 1:

French and Swiss proposal. [Question of substance (2).]

British proposal. [Question of wording.]

German proposal for an additional paragraph (life annuity). [Question of substance (2).]

Polish proposal for an additional paragraph aiming at the case of delay. [Question of substance (2).]

Paragraph 2:

For the record: French proposal: Consequence of the proposal mentioned at the first paragraph. [Question of substance (1).]

British proposal. [Question of wording.]

Swiss proposal for a special limitation of liability in the case of delay. [Question of substance (1).]

Paragraph 3:

German proposal (1,000 francs). [Question of substance (1).]

Paragraph 4:

French proposal: Consequence of the proposal made at Article 1. [Question of substance (1).]

Article 24

Paragraph 1:

German proposal: Replace "the interested party" by "the injured party". [Question of wording.]

Swiss proposal to add a paragraph 1 bis: The categories of persons who are authorized to receive the sums due from the carrier following an accident for which he is considered liable shall be determined by the national law of the deceased. (See additional German proposal to paragraph 2.)

Paragraph 2:

German proposal: gross negligence likened to intentional act. [Question of substance (2).]

German proposal to add a supplementary paragraph indicating that the question of the representatives is not settled. [Question of wording.]

French proposal: modification of the end of the paragraph. [Question of substance (2).]

Observation of the British Delegation on the interpretation to be given to the rule set forth. [Question of substance (1).]

British proposal: Referral to national law for the liability provided for in case of illicit act. [Question of substance (2).]

Article 25

Paragraph 1:

Japanese proposal on the reservation of national law. [Question of substance (1).]

German proposal "except for the case of delay" (see Article 22). [Question of wording.]

Paragraph 2:
German proposal: Add the words "within the present Convention". [Question of wording.]

Article 26

For the record: The German Delegation reserves the right to present amendments of substance for paragraphs 2 and 3.

Paragraph 1:
Proposal of Great Britain (Contracting State). [Question of wording.]
British proposal: Elimination of the competence of the place of accident. [Question of substance (2).]
Additional proposal of the Hungarian Delegation on paragraph 1. [Question of wording.]

Paragraph 2:
Japanese and British proposal for its elimination. [Question of substance (1).]
Proposal for an additional paragraph by the British Delegation. [Question of substance (2).]

Paragraph 3:
British proposal on the role of nationality. [Question of substance (2).]

Article 27

Paragraph 1:
British proposal: Add to the first line the word "acceptance". [Question of wording.]
Four[1] proposals concerning the period of time. [Question of substance (1).]

Paragraph 2:
German proposal on non-apparent damage or delay. [Question of wording.]
British, French, Japanese proposal on the period of time. [Question of substance (1).]

1 See also Swiss amendment—Minutes page 97.

Paragraph 1:
British proposal: Elimination of the words "except for contrary proof". [Question of substance (2).]

Paragraph 3:
British proposal (see paragraph 2). [Question of substance (1).]

Last paragraph:
Swiss proposal on the period of protest. [Question of substance (1).]

Article 28

Paragraph 1:
German proposal: The moment when they should have arrived. [Question of wording.]
Hungarian proposal on the possibility of adopting Article 45 of the Bern Convention. [Question of substance (1).]
Italian proposal: plea in bar instead of period of limitation. [Question of substance (1).]

Article 29

German proposal on the classification of Articles 25 to 29. [Question of wording.]
Paragraph 2:
British proposal: Add to the third line the words "or of delay" (consequence of the general problem of delay).

Paragraph 3:
British proposal: recourse against successive carriers. [Question of substance (1).]

Article 30

German proposal: Elimination of arbitration. [Question of substance (1).]
Japanese proposal: Option to deviate from the rules of competence. [Question of substance (2).]

Article 31 bis

Czechoslovakian proposal to add an additional article. [Question of substance (2).]

French proposal to add an article for exceptional carriage. [Question of substance (2).]

British proposal for an additional article. [Question of wording.]

Polish proposal for a modification in relation to Article 3.

Swiss proposal for a periodic revision of the Convention in relation to article (e) of the Polish proposal.

The German Delegation proposes to arrange the articles in the following order: 25-27-29-28-26.

Soviet proposal presented in committee: Reduce the term provided to six months. (Article (c)).

Similar proposal of the Swedish Delegation. (Article (e)).

Closing Protocol

Additional clause to Article 1 to be inserted in the closing protocol as it has been proposed by the German Delegation (non-reciprocity vis-a-vis Non-Contracting States).

EXHIBIT C

Doc 7686-LC/140

INTERNATIONAL CIVIL AVIATION ORGANIZATION

INTERNATIONAL CONFERENCE
on Private Air Law

The Hague, September 1955

Volume I

MINUTES

September 1956

MONTREAL CANADA

ELEVENTH MEETING

(Tuesday, 13 September 1955 at 1445 hours)

President Mr. D. Goedhuis

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29. CONSIDERATION OF THE DRAFT PROTOCOL ARTICLE BY ARTICLE—First Reading

Report of the Working Group on Article 3 of the Convention

B. Notice to the person concerned in regard to the applicability of the Convention (Continuation of discussion)

Mr. Cooper (IATA) referred to the text which the United Kingdom had proposed for the statement on the passenger ticket, which text would read as follows:

> "Carriage which is 'international', as defined by the Convention of Warsaw of 12th October, 1929, is subject to conditions which limit the air carrier's liability for death or personal injury as provided in the said Convention, such liability being limited to . . . . . Poincaré gold francs."

He also referred to the proposed text of a statement presented by the United States Delegation, the text reading as follows:

> "*Advice to International Travellers*
>
> Travellers embarking upon a journey involving an ultimate destination or stop in a country other than the country of origin are advised that the Warsaw Convention may be applicable to their journey. The Convention governs the liability of carriers to passengers and shippers and limits liability for personal injury or death in most cases to . . . . . Poincaré gold francs."

Under either of these two texts it was possible for the carrier to use a single form of ticket for Warsaw or non-Warsaw traffic, while under the Rio Protocol there was the difficult traffic position where one had to use two separate forms of ticket. If a carrier used the form of ticket with the Rio statement on it for non-Warsaw traffic, he would be guilty of a misrepresentation to the passenger. He hoped that the delegations would choose either the United States or the United Kingdom formula, as they were practicable.

Mr. Heller (New Zealand) noted that the United Kingdom and United States proposals expressed the limit of liability in Poincaré gold francs and he doubted whether this would bring to the notice of the general public the certain amount up to which the liability was limited. He suggested that the proposals be amended so that the amount of the limit would be expressed in the national currency of the carrier with a margin to allow for fluctuations in valuation; if that were not acceptable, it would be preferable not to make any reference to the amount of the limitation.

Mr. Alten (Norway) preferred his own proposal which read as follows:

> "If the place of departure or destination or an agreed stopping place is not situated within the territory of the State where the ticket is issued, it shall also contain, or have attached to it, an advice to the passenger, that the liability of the carrier may be subject to limitation under the provisions of this Convention or of applicable national law."

This would be an addition to Article 3(1) of his proposal made at an earlier meeting.[1]

He felt that the amount of the limit of liability should not be mentioned either in Poincaré gold francs or in a national currency.

Mr. Wilberforce (United Kingdom) said, in a reply to a question of the President, that the reference to the Poincaré gold francs had been included in the United Kingdom proposal pursuant to a suggestion made in the Working Group. However, since there was now some opposition to referring to the amount of the limit in the text, it might be better to put the United Kingdom proposal to vote without the reference to the amount and then take a separate vote on the question whether the mention of gold francs should be added or not.

Mr. Sidenbladh (Sweden) said that a reference in the ticket to Poincaré gold francs would mean nothing to the man in the

1 See II, 233.

street. Moreover, it would be against the Convention if, on the ticket, one tried to convert these francs into national currencies according to the gold value at a date other than the date of judgment.

A first vote should be taken on the proposals without taking into account whether they contained the amount of the limit or not and then the Conference could have a special vote on whether a reference to the amount of the limit stated in terms of a currency should be added.

He found it difficult to make a choice between the United States and the United Kingdom proposals, as the first required to be put in somewhat more legal language, while the second had to be made less legal and more comprehensible for the man in the street.

Mr. Findziński (People's Republic of Poland) preferred the more general form of statement as set out in the Rio text, to the proposal of the United States (see above) and that of the IATA, the latter reading as follows:

> "The ticket shall also contain a statement that travellers embarking upon a journey involving an ultimate destination or stop in a country other than that of the place of departure are advised that the Warsaw Convention may be applicable to their journey and that the Convention governs the liability of carriers to passengers and limits liability of carriers to passengers for personal injury and death in most cases to . . . . . Poincaré gold francs."

Mr. Booth (Canada) said that his Delegation could support either the United Kingdom or the United States proposal, although it would be more inclined to accept the United Kingdom proposal since the language in the other proposal was rather loose.

He suggested that, when the vote on all the various proposals took place, a vote on the principle behind the United Kingdom and the United States proposal be taken and that, if this principle received the greatest number of votes, then there could be a vote between the United Kingdom and the United States text.

He did not agree with the Observer from the IUAI who had said that the text concerning the notice should not refer to the number of Poincaré gold francs involved, because some passenger might get the idea that he would receive that amount in any event. The objection of the IUAI Observer was quite irrelevant to the problem before the Conference. The Conference was concerned with having the person concerned receive notice. What were the consequences to that person if he mistakenly believed that he was insured for the amount stated in the notice? The answer was that this person could make up his own mind as to whether or not he would insure for a greater amount. However, although it would serve a useful purpose to mention the amount of Poincaré gold francs, it would not be practical to translate this amount into domestic currencies. The essential thing to do was to give a warning to the passenger that there was a limitation. Of course, neither the United States nor the United Kingdom proposal was a completely adequate notice because, as someone had said, in order to have such a notice the whole Convention would have to be repeated. But anyone who was not put on warning by the notice provisions of either of these proposals would probably not be interested. If a passenger were put on warning by the notice which included the amount of the limit expressed in Poincaré gold francs, then the passenger could be interested in finding out what this amount would be in domestic currencies. With a view to assisting passengers of the latter type, airlines could keep their agents informed from time to time as to the equivalent of Poincaré gold francs in domestic currencies.

He agreed with the suggestion that the question whether or not the amount of currency should be indicated might be voted on separately.

Mr. O'Connor (Ireland) said that, in the case of the notice, in order to establish a fair balance between the public interest, as represented by the passengers, and the private interest, as represented by the carriers, one had to weigh the balance a little in favour of the passenger who was in an inferior position in relation to the knowledge of the law governing the carriage. The proposals before the meeting merely paid lip-service to the principle that the passenger should have knowledge of the Convention. These proposals tried to make the passenger aware of the existence of the Convention, but made no effort to tell him what the Warsaw Convention covered, or in what circumstances it would operate. Only the United States proposal attempted to go a little in that direction.

He felt that the United States proposal should be strengthened. The word "advice", as used in the heading of that proposal, was not sufficiently strong. The word "notice" would draw the attention of the passengers. Moreover, the word "international" should be deleted from the heading because the traveller might not know that he was an "international" traveller and might not read the notice if he were travelling between two points under the same jurisdiction unless it was made clear to him that the journey involved an intermediate stopping place in another country and that such stopping place would make the journey international.

The notice should also state that the liability of the carrier for personal injury or death of a passenger was limited and also express the maximum amount of the limit of liability in local currency.

The United States notice should further state that the passenger might inspect a list of signers of the Warsaw Convention if he so desired. Such a list would be kept in the ticket offices.

Mr. Poulton (Australia) said that one difficulty had not been mentioned up till that time, namely, that States might find themselves parties to both the Warsaw Convention and the Convention as amended by the Protocol. If that problem were not solved, the booking clerk would find it difficult to know which system applied: the Warsaw Convention alone, the Convention as amended by the Protocol, or no Convention at all.

He agreed with Mr. Cooper that there was a vital difference between the Rio text on the one hand and the proposals of the United States and the United Kingdom on the other hand. He supported the principle behind the latter proposals but inclined toward the language of the United Kingdom proposal. The principle behind the United Kingdom and the United States

proposals would operate to give the passenger all the notice that was required.

The notice provision should contain no reference to the amount of the limit of liability.

Mr. Garnault (France) said that the United States proposal had been attacked on the basis of its drafting. He felt that it was too early to discuss the proposal on this basis, and that it should be considered on the basis of the principle behind it.

On a point of substance, the United States proposal had been criticized because it expressed the limit of liability in figures, these figures being expressed in terms of Poincaré gold francs. He considered that it was not enough merely to say that the liability of the carrier was limited if the liability were expressed in terms of Poincaré gold francs, at least the attention of the passenger would be drawn to the specific nature of the limit. That would lead the passenger to have the natural reaction of insuring himself in any case where he considered that a limitation of liability would lessen his rights. That was the practical interest of the United States proposal.

The French Delegation had earlier stated its preference for the Rio text, but had tried to reach a compromise with the other points of view. It now saw a desire among some to return to the Rio text. He pointed out that the vote which would be taken on the United States or British proposal would be followed by a vote on the sanction and that the heavier the burden imposed on the carrier, from the point of view of the particular which should be included in the ticket, the less certain Delegations would be prepared to impose the sanction of unlimited liability which was the one provided by the Rio Protocol. Consequently, those who wished to have the notice provision coupled with the sanction of unlimited liability should not be too demanding in regard to the notice which should be included in the ticket.

The Conference took a tentative vote on the three proposals concerning the form of the notice to be included in the passenger ticket, it being understood that a subsequent vote would be taken on the question whether a reference to the amount of the limit should be included in the provision ultimately adopted; the results of the vote were as follows:

1) *The United States*[1]-IATA[2] *proposal (the respective versions being set out elsewhere) received twenty-two votes;*
2) *The United Kingdom-Israeli proposal (the text being set out above) received sixteen votes;*
3) *The text of Article III(a) of the draft Protocol which read in part: "and a statement that the carriage is subject to the rules relating to liability established by the Convention", received thirteen votes.*

(*Note*: The proposal of the Delegation of Norway set out above was not seconded.)

The Conference rejected, by a vote of 20 to 16, the proposal supported by various Delegations to insert in the text ultimately adopted concerning the notice, a reference to the amount of the limit of liability.

The Conference adopted, by a definitive vote of 20 to 10, the United States-IATA proposal (the versions being as set out above, but without the words "to . . . . Poincaré gold francs"), it being understood that it would be left up to the Drafting Committee to prepare the final text.

Mr. Calkins (United States) then proposed that Protocol specify the size and colour of the type in which the notice embodied in the United States-IATA proposal which had just been adopted should be given. The heading of the notice should be set out in letters of not less than five millimetres high.

Mr. Cooper (IATA) objected to having such provisions in the Protocol as they would impede the future handling of traffic documentation.

Mr. Garnault (France) thought that the United States proposal was a practical one. He drew attention to the precedent of insurance policies where, by law, certain clauses were required to be in heavy type.

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1 See I, 120.

2 See II, 254.

The Conference rejected, by a vote of 17 to 14, the United States proposal concerning the size and colour of the type in which the notice should be printed.

C. Sanctions

Mr. Loaeza (Mexico), Chairman of the Working Group on Article 3 of the Convention, said that Part C of the report of the Working Group was concerned with the question whether there should be sanctions included in the amended Convention and also with the question of what the sanctions should be if it were decided to include them.

Mr. Goodfellow (IUAI - ICC) once more drew attention to the proposal of the ICC that Chapter II of the Convention should be deleted leaving the question of documents of carriage to be settled on a commercial basis. Even though that suggestion had not been accepted, he still felt that it should be considered again at some stage in the discussions.

In regard to the question of sanctions, it had been generally assumed in the present discussion that Article 3 of the present Convention did not contain any sanctions. But that view was not correct since it was quite clear from Article 3(2) of the Convention that, if the carrier failed to deliver a ticket, he would lose the benefit of limited liability.

It had been suggested by some lawyers that, because Article 3(2) did not specifically refer to a ticket containing the requirements laid down in Article 3(1), the sanction did not apply if the carrier issued any form of document. It was by no mean certain that the courts would take that view.

He wished to give two examples relating to the application of Article 3(2) of the Convention.

First of all, there was the case of the bad carrier, who knew that he was operating international carriage, but who, nevertheless, sought to evade his responsibility by carrying under a document which purported to relieve him from all liability. He suggested that, in such a case, the Court would state that it was quite clear that the object of Article 3(2) was to ensure that the carrier should deliver a ticket, not necessarily in the precise form laid down by Article 3(1), but giving the appropriate

information to the passenger to show whether the Convention applied or not, to show against whom the claimant had a right of action, and, generally, to put the claimant in a position to judge his rights and to exercise them. The Court would find that the carrier in this case had completely disregarded his obligations under the Convention and had attempted to evade them. The Court would hold that this was a clear breach of Article 3 and that the carrier was liable without limit.

A second case at the other end of the scale would be one in which the ticket had been issued by a booking agent who had omitted one of the required particulars, such as an agreed stopping place. It might be a case of an unexplained accident in which the claimant would have been entitled to no recovery under the common law rules, but was entitled to recover under the Convention because, owing to the death of the crew, the carrier might not be able to prove that he and his servants had taken all the necessary measures to avoid the damage, or that it was impossible for them to do so. In such a case, with a view to avoiding the Convention limits, the claimant might contend that the omission of one of the agreed stopping places meant that the ticket did not comply strictly with the requirements of Article 3(i) and Article 3(ii) must be construed as referring to a ticket which complied with the requirements of the preceding paragraph. He thought that the Court would have no difficulty in distinguishing this case from the one first quoted, and would reject the claimant's argument. It would hold that the ticket, which contained, either expressly or by reference to the air carrier's time tables, all the material information to enable the passenger to ascertain his rights, was a ticket within the meaning of Article 3(ii), that there had been no attempt on the part of the carrier to evade his obligations under the Convention, and that he did not lose the benefit of limitation of liability.

He suggested that the foregoing constituted a correct interpretation of Article 3, and, if this interpretation were accepted, the Article did not require any amendment. It would be a retrograde step to accept the alternative which had been proposed, namely, to subject the carrier to the loss of all limitation of liability for what would always be an unintentional mistake in the case of the second carrier mentioned above. Moreover, the pro-

posed alternative would make any simplification of the documents of carriage difficult, if not impossible, and this at a time when air travel was becoming more and more general. To impose on the carrier, for an unintentional mistake, the same Draconian limit as was imposed upon him for wilful misconduct under Article 25 of the Convention did not seem to be in accordance with principles of international justice.

In view of the foregoing, the sanction existing in the Convention should be left as it was.

Mr. Garnault (France) said that the Conference was now discussing the question of sanctions in a different context than that in relation to which it had discussed the question before. Due to the adoption of the United States-IATA proposal concerning the notice to be included in the ticket, the objection originally made to the inclusion of sanctions, consisting in the difficulty which the booking clerks had in issuing tickets in proper form, no longer existed. The new notice to be included in the ticket would warn the passenger about the particular risk involved and this involved neither a risk nor a difficulty for the carriers or their servants or agents. Under these circumstances, since there was no longer any risk involved in providing for the inclusion of a notice in the ticket, his Delegation was unable to understand why any sanction applicable to the omission of such a harmless notice should not be included. The non-inclusion of a provision for sanctions would be even more curious in view of the fact that the Observer from the IUAI had pointed that if the sanctions were not included, the Courts might, perhaps, apply them. The sanction should apply in cases where there was a flagrant neglect on the part of the carrier to give a notice to the passenger. Nothing obliged the Conference to provide that the sanction would apply in the case where the carrier had forgotten to indicate the place of departure or of destination.

The effect of what he had said was that he was making a proposal that the sanction should apply in the case of the omission of the notice as set out in the United States-IATA proposal which had been adopted.

Mr. Calkins (United States) referred to the United States proposal concerning the sanctions, which read as follows:

> "Nevertheless if the carrier accepts the passenger without a passenger ticket having been delivered or if the ticket does not include the statement in the form required by Paragraph (1) relating to the applicability of the Convention he shall not be entitled to avail himself of any of the defenses which exclude or limit his liability."

This proposal related to the sanctions for failure to deliver a ticket or for failure to deliver a ticket which included the notice. The Rio text would have the same effect.

Mr. Riese (Federal Republic of Germany) said that the contents of the passenger ticket had now become so vague because of the recent decision, that one no longer knew whether the carriage was subject to the Convention or not. Moreover, the ticket would not indicate the amount which the passengers normally had a right to claim pursuant to the Convention. All that had been retained was a notice which, in effect, said that, if the Convention applied, the passenger would risk being subject to a limit, the amount of which was not indicated.

The consequence of the above-mentioned decision could be different according to one's point of view. Thus, Mr. Garnault had just said that, since there was no longer any risk for the carrier and since the latter need only do what he was told, that is, to issue a ticket containing the notice in every case, a severe sanction could be imposed on the carrier. But, it should also be said that, since the contents of the ticket were now of so little importance, it was not worth while providing for an extremely severe sanction for the case where the notice was lacking. Suppose a ticket agent issued an old form of ticket which did not contain the notice. Was that a reason for exposing the carrier, who had not, himself, issued the ticket, to unlimited liability? He (Mr. Riese) was thinking not only of the large airline, but also of the occasional small carriers who, perhaps, might carry someone even without issuing a ticket. Would they be subject to unlimited liability which would exceed the limit of their insurance? Was it just to provide for the sanction in the latter cases?

In view of the foregoing, he was against having a private law sanction in order to enforce the issue of the passenger ticket in a

particular form. No such sanction existed in relation to any other document of carriage in the other fields of transportation.

Therefore, he once more proposed that no private law sanction be included in the Convention.

Mr. Cooper (IATA) referred to the words: "Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered", set forth in the second sentence of Article III(b) of the Protocol. He wondered whether these words meant that, in order to maintain the limit of liability, the carrier must prove that a ticket had been delivered to every passenger even though the aircraft had been completely lost, or that the passenger, if he survived or a claimant, had the burden of proving non-delivery. He wished it to be recorded that, in his view, the above-mentioned text required proof by the claimant that the ticket had not been delivered. If there were any doubt about this interpretation, then the text should be clarified. He was looking ahead the time of mass transportation by air where the fare would be collected on the aircraft and the ticket issued there. Under these circumstances the burden of proving that the ticket had not been issued should be on the passenger rather than on the carrier.

Mr. Calkins (United States) preferred to have sanctions imposed by private law rather than having them imposed by the various States under public law. The reasons for this preference were, first of all, that with a private law sanction there would be the possibility of applying a uniform sanction for non-compliance with the requirements of the Convention, and secondly, the policing of these sanctions would be made more easy. In regard to the second reason, he pointed out that 30 million tickets had been issued for international air carriage during 1954; it would have been impossible for any Government to check all those tickets to see whether they complied with the requirements of the Convention. In the case of private law sanctions, no heavy policing was required because, in the event that no ticket was issued, the claimant had his remedy against the carrier.

In regard to the private law sanction, the Conference had to decide whether it wished to apply the sanction to all the particulars to be included in the passenger ticket or only to a few of the particulars. He did not feel that the sanction should apply to the particulars concerning a place of departure and place of destination and the agreed stopping places. The passenger should certainly assume the obligations of seeing to it that the ticket issued to him set forth these places. However, the sanction should apply to the particulars concerning this notice.

With respect to the extent of the sanction, his Delegation had proposed that the sanction should be framed in terms of the language of the Warsaw Convention and should include the words "exclude or" (see text of United States proposal above). That was the strongest sanction that one could have. It was an appropriate sanction since it would be so easy for carriers to comply with the notice requirement.

With respect to the Australian proposal, he did not believe that a 50% increase in the limit was an adequate amount for the sanction. The claimant should be permitted to recover the amount of his proven damage.

In view of the foregoing, he submitted that the appropriate sanction was a private law sanction, that the sanction should apply only in the case of failure to issue a ticket or if a ticket were issued without the notice which had been adopted, and that the sanction should consist in the removal of the limits of liability, and the exclusion of defense.

Mr. Géomez Jara (Spain) said that only the omission of the notice concerning the possible application of the limit of liability should involve the application of the sanction of unlimited liability. The fundamental element of the Convention was that it restricted the rights of the passenger by limiting the liability of the Carrier. Therefore, it was only just and logical to draw the attention of the passenger to the possible limitation of the carrier's liability.

The sanction should involve only the loss of the limitation of liability by the carrier and should not, as was contemplated by the United States proposal deprive the carrier of defences which might exclude his liability. If, for example, the defence under Article 20 of the Convention were taken away, the consequence

would be that the carrier would not only be subject to unlimited liability, but also to absolute liability.

With regard to Mr. Cooper's remarks concerning the burden of proof in regard to non-delivery of the ticket, the Spanish Delegation felt that this was a question reserved exclusively to the law governing procedure in the country in which the proceedings took place.

Mr. Diaeddine Saleh (Egypt) was in favour of deleting too severe sanctions from the Convention.

In regard to Mr. Cooper's point concerning the burden of proof of direct link between the negligence of the carrier in issuing the document of carriage and the damage suffered by the passenger, he (Mr. Diaeddine Saleh) stated that the application of the general principles of law would place the burden of proof on the victim, the consequence being that the victim would most often find it impossible to adduce proof and would thus the negligence of the carrier would be left without a special sanction. It would be more equitable to provide that the mere proof by the victim of the negligence of the carrier would raise, as against the latter, a presumption that the damage had been caused by the carrier and then the latter would have to show that the damage was due to another cause.

Mr. Sidenbladh (Sweden) said, in regard to Mr. Cooper's comments, that it was the claimant who must prove that no ticket had been issued.

He referred to the Australian proposal on sanction which read as follows:

> "Nevertheless, if the carrier accepts a passenger without a passenger ticket having been issued which complies with paragraph (1) of this Article the carriage shall be subject to the rules relating to liability established by the Convention except that the limits of liability specified in Article 22 thereof shall, if otherwise applicable, be increased by fifty per cent."

This was a realistic and useful compromise which gave certain advantages not only to the carriers, but also to the passengers. He hoped that the Conference might adopt this solution. He

had thought, at first, that the Australian proposal did not intend to make any change in the Rio text but, he noted that, whereas the Rio text provided for a sanction of unlimited liability, the Australian text provided for a sanction involving an increase of the limit by fifty per cent. He asked the Australian Delegate if the Australian text included any other differences as compared with the Rio text.

Mr. Poulton (Australia) said that his text had been drafted before Article III(a) of the Protocol had been finally settled, and at that time, he had not known exactly what was going to be in Article III(a). However, the effect of the Australian text was as follows: If there were a failure to deliver a ticket, or if the ticket did not include the notice which had now been adopted by the Conference, then, in either of those two cases, the carrier, instead of being liable without limit, would be liable to the extent of the limit increased by fifty per cent. For that matter he had no objection to the limit being doubled. The idea was to establish the sanction at a reasonable and insurable level instead of eventually reaching some prodigious figure which had no relation whatever to the damage which followed from the non-issuance of the ticket or the omission of the notice.

In view of Mr. Sidenbladh's comments, he would reframe the first part of his proposal in the terms of the Rio text so that it would read thus:

> "Nevertheless, if the carrier accepts the passenger without a passenger ticket having been delivered, or if the ticket does not include the statement in the form required by paragraph (1) relating to the applicability of the Convention the carriage shall be subject . . ."

Mr. Drion (Netherlands) said, in relation to Mr. Cooper's remark concerning the burden of proof with respect to the non-delivery of the passenger ticket, that, under the Warsaw Convention, there could be no doubt as to the burden of proof being on the claimant if he wanted to have unlimited liability imposed on the carrier. The limitation of liability was the rule and there was a certain provision which said that, in certain circumstances, that rule would not apply. It was up to the claim-

ant to prove that these circumstances existed. Consequently, no special provision was required in the Protocol on this point.

It would be over-simplifying the question before the Conference to say that it had to make a choice between the possibility of a public law sanction, on the one hand, and that of a private law sanction, on the other. In the field of private law sanction there was a choice among three possibilities: 1) There was the normal private law sanction for non-compliance with certain obligations, namely, the sanction that one who did not comply with his obligations had to pay compensation for damage resulting from that non-compliance; 2) there was the sanction of unlimited liability without any relation to the actual damage arising from the non-compliance of the carrier with the obligations imposed upon him; 3) there was the sanction of a limited and absolute liability without any relation to the damage arising from the non-compliance.

There had been a curious opposition from those most interested in protecting the passenger by the notice in the ticket, against applying to the carrier the normal sanction of payment of compensation for damage resulting from the non-compliance of the carrier with the obligations imposed upon him. These persons contended that the passenger had an interest in having the obligations of delivering a ticket and including the notice in the ticket imposed upon the carrier. One would think that, if the passenger had an actual interest, then, if these obligations were not complied with, the passenger would suffer actual damage, since the non-compliance and the damage would be related to each other. But the same people said that, if the sanction consisted in the payment of compensation for actual damage, that would be no sanction at all. This was the same thing as saying that the passenger would never suffer actual damage because of the non-compliance, or that, at least, the damage would not be provable. Consequently, the people above-mentioned rather doubted about the actual interest which the passenger had in the notices on the ticket.

It might be suggested that, since a question of proof was involved, a presumption that damage had been caused could be created as against the carrier. But such a presumption could only be created if it were felt that, generally, actual damage

would result from the non-compliance of the carrier. As it is hardly likely that actual damage will result from the non-compliance, there was no real basis for the above-mentioned presumption. Moreover, in the case where the passenger had taken out a very big accident insurance, there would be no actual damage resulting from the carrier non-compliance and the sanction would, in this case, be imposed without any rational basis.

He agreed with a remark made by Mr. Riese at an earlier date to the effect that the system of the sanction resulted in a great lack of equality between passengers. Those having a ticket with an omission would be in more favourable position than those who had a ticket issued in due form, since the former could claim unlimited liability on the part of the carrier, while the latter could only claim limited liability.

He said that it should be made clear, in voting on the Rio text which text spoke of a non-availability to the carrier of any provisions which limited his liability in respect of the passenger, whether that text referred only to the limits of Article 22 or was intended to refer to other provisions in the Convention (e.g., Article 21) limiting the carrier's liability.

A further difficulty in applying a sanction in the case of the notice was that tickets were issued in languages which often were not the languages of the passengers. Thus, a lawyer might be able to argue that a ticket issued in a language other than that of the passenger did not contain a sufficient notice. The consequence would be that a large United States International Airline might have to issue tickets in some forty different languages.

Mr. Ambrosini (Italy) said that the Protocol should include a sanction, specifically, a private law sanction. The reason for the sanction was that the passenger ticket, being a fixed-term contract (*contrat d'adhéesion*), the passenger had to accept it without being able to discuss the clauses set out therein. Under these circumstances, the passenger should receive notice, through a clause inserted in the ticket, that there was a limitation of liability, that is, that there was a deviation from the general principle of law that all damage should be fully compensated. For this

reason, Mr. Drion's arguments were not valid. Mr. Drion had asked why the carrier should pay without limitation if the absence of a ticket did not by itself give rise to actual damage. The reply to this question was that the carrier should be subject to unlimited liability because he had violated the principle of public policy to the effect that the passenger should be given notice of the limitation of liability.

With regard to Mr. Cooper's question as to whether the passenger or the carrier had the burden of proof in the case of non-delivery of the passenger ticket, he pointed out that the Rio text, by stating that "if the carrier *accepts* a passenger without a passenger ticket having been delivered" indicated that the carrier had consented to carry the passenger without delivering the passenger ticket. If that were true, then it was altogether normal that it should be up to the passenger to show that the carrier had agreed to carry him without delivering the passenger ticket. Since both the Rio and the United States texts were clear on this point, there was no need to amend them in this regard.

The reason why the absence of the ticket should involve the same sanction as the omission of the notice from a ticket which had been delivered, was that if there were no ticket there would be no notice given to the passenger concerning the limitation of liability.

He noted that the sanction as expressed in the United States text was that the carrier "shall not be entitled to avail himself of any of the defences which *exclude or* limit his liability". He thought it was necessary to delete the words "exclude or", because if the damage were caused by a case of *force majeure*, it would not be equitable for the carrier not to have the right of being free from liability.

His Delegation could accept the Australian proposal if the sanction imposed on the carrier were double the limit of his liability.

Mr. Wilberforce (United Kingdom) referred to the United Kingdom proposal to the effect that the observance of the provisions of Article 3(1) should be ensured by the national law, the text of that proposal reading as follows:

> "Each Contracting State undertakes to adopt measures within its jurisdiction to ensure that the provisions of Article 3(1) are complied with."

This was a practical solution. It had been used in the United Kingdom and in the United States without, as far as he knew, giving rise to policing difficulties.

He was opposed to including the words "exclude or" in the United States text, since the inclusion of the words would seem to deprive the carrier of the defences based upon Article 20 of the Convention, and might even deprive him of all defences of the prescription provisions of the Convention.

He wished the Drafting Committee to consider the words "*accepts* a passenger" found in the Rio text. The word "accepts" was not satisfactory and should be replaced by the word "carries" or some similar word.

Mr. Booth (Canada) was opposed to having a sanction which would impose unlimited liability on the carrier. His Delegation hoped that whatever limits were fixed in the amended Convention would be sufficient to cover completely damage sustained by at least a majority of the air-travelling public. In that event, the failure to give notice would only be of significance to a minority. In the case of that minority the sanction of unlimited liability should only be applicable, in practice, where the passenger was taking his first international flight, since, from then on, that person would be deemed to have had notice of the limitation.

He was not in favour of the German and Israeli proposals. He favoured, as a first choice, the Norwegian proposal. His next choice would be the Australian proposal which provided some limit of liability in the case of the application of a sanction. He was not attracted by the United Kingdom proposal because of the possibility of different treatment being handed out to carriers in different States.

The Conference rejected, by a vote of 25 to 5, the proposal of the Federal Republic of Germany to the effect that there should be no sanctions in Article 3(2) of the Convention.

The Conference rejected, by a vote of 24 to 5, the above-mentioned proposal[1] of the United Kingdom.

The Conference did not vote on an Israeli proposal to the effect that the passenger or consignor who had not been issued with the required document should be given the option to proceed either under the Convention or under the appropriate national law, because this proposal had not been seconded.

The Conference rejected, by a vote of 21 to 11, the proposal of Norway whereby, in the event of a failure to deliver a ticket or in the event of the delivery of a ticket with insufficient statements, the carrier would be liable for the resulting increase of costs and for delay, as provided in Article 19.

Mr. Poulton (Australia) proposed that the words "fifty per cent" be deleted from the Australian text and replaced by the words "one hundred per cent".

The Conference rejected, by a vote of 30 to 2, the proposal of the United States to insert the words "exclude or" before the word "limit" in the last part of Article III(b) of the draft Protocol.

The Conference rejected, by a vote of 19 to 12, the Australian proposal, the text of which is given above[2], as amended by its proposer during the discussion.

The Chairman then proposed to put to vote the text set out in the third sentence of Article III(b) of the draft Protocol.

Mr. Calkins (United States) proposed that the Conference vote on the United States text[3] with the deletion of the words "exclude or".

Mr. Mintz (Israel) said that he could accept the United States proposal if the Drafting Committee would be free to reconsider

1 See I, 132.

2 See I, 129, 130.

3 See II, 243.

the words "to avail himself of any of the defences which limit his liability" and to substitute therefor a more defined text.

Mr. Wilberforce (United Kingdom) repeated his proposal that the Drafting Committee should consider whether the word "accepts", in the first sentence of Article III(b), could be replaced by the word "carries" or some similar word.

Mr. Ambrosini (Italy) said that there was a difference between saying that the carrier "accepted" a passenger and "carried" a passenger. This was a question of substance and not one of drafting. What it was wished to establish was that there was a specific will on the part of the carrier to carry the passenger without delivery of the passenger ticket. The word "accepts" as used in the text, implied consent to perform the carriage. The reason for the use of this word was to exclude the case of the stowaway who might go on board without being noticed by the carrier.

Mr. Wilberforce (United Kingdom) agreed that the paragraph must relate to carriage by consent. He thought that the question of a stowaway would be eliminated, by the use of the word "passenger". A stowaway was not a passenger. He wished to cover the case referred to by Mr. Cooper whereby air carrier might wish to let passengers on to the aircraft and deliver the tickets there. The present wording would prevent this since the passenger ticket would have to be delivered before the passenger was accepted. Under the present text, if a carrier were to issue tickets on the aircraft, he would incur the risk of unlimited liability.

Mr. Cooper (IATA) said, in relation to the United States text, that the word "defences" should be replaced by a specific reference to the "provisions" of certain Article which limited the carrier's liability as to passengers, since the word "defences" might mean contributory negligence among other things.

The President stated that the word "provisions" would be used instead of the word "defences".

The Conference adopted, by a vote of 20 to 11 the United States text, which read as follows:

> "Nevertheless if the carrier accepts the passenger without a passenger ticket having been delivered or if the ticket does not include the statement in the form required by paragraph (1) relating to the applicability of the Convention he shall not be entitled to avail himself of any of the provisions which limit his liability."

In adopting this proposal, the Conference referred to the Drafting Committee the two following points:

a) whether or not the word "accepts" could be replaced by the word "carriers" or some similar word;

b) an Israeli proposal to have the last part of the text read as follows:

> "the limits of liability specified in Article 22(1) of the Convention shall not apply."

(The meeting adjourned at 1800 hours)

EXHIBIT D

Doc 7686 - LC/140

INTERNATIONAL CIVIL AVIATION ORGANIZATION

INTERNATIONAL CONFERENCE

on Private Air Law

The Hague, September 1955

Volume II

DOCUMENTS

September 1956

12. REPORT ON REVISION OF THE WARSAW CONVENTION

(Adopted by the Legal Committee of ICAO at Rio de Janeiro in September 1953)

I. HISTORICAL

1. Since 1935 the question of revising the Warsaw Convention of October 12, 1929, for the unification of certain rules relating to international carriage by air, has engaged the attention of jurists, particularly the Comité International Technique d'Experts Juridiques Aériens (CITEJA), and the International Air Traffic Association. After the second world war, the matter was taken up by the Provisional International Civil Aviation Organization which referred the subject to CITEJA for study. The CITEJA having been dissolved in 1947, the Legal Committee of ICAO undertook to continue the study of the subject. During the years 1948-1951, such study was further developed in the Legal Committee and several draft conventions were formulated by Major K.M. Beaumont, Rapporteur, as a result of discussions in the Committee. These drafts, as well as relevant questionnaires were transmitted to all Contracting States and other interested governments and international organizations. In January 1952, a special sub-committee appointed by the Legal Committee prepared at Paris a complete draft convention to replace the Warsaw Convention. The draft was submitted to the Legal Committee at its Ninth Session.

II. ACTION TAKEN BY THE COMMITTEE AT ITS NINTH SESSION

2. At its initial meeting the Committee considered and discussed the general question as to the desirability of revising the Warsaw Convention and, if such revision was thought desirable, the extent and scope of such revision. It was generally, though not unanimously, agreed that some modifications should be made to the Warsaw Convention in the light of practical difficulties experienced in the application of certain provisions of the Convention and also to remove certain other

difficulties of a legal nature. The majority of the Committee, however, was of the opinion that, having regard to the widespread acceptance of the Warsaw Convention among Contracting and other States, it would not be expedient to replace it by an entirely new one the ratification of which might involve considerable delay; and that, instead, the Convention should be modified to a limited extent to resolve actual difficulties of practical application of its provisions and to bring it into conformity with the developments, economic and polictical, which have taken place during the last quarter of a century. Therefore, while recognizing the unquestionable value of the draft formulated at Paris by its sub-committee and of the preparatory and exploratory work undertaken by its rapporteur, Major K.M. Beaumont, particularly inasmuch as that draft represented a systematic rearrangement, including drafting improvements, of the contents of the Warsaw Convention and included also fresh treatment of certain subjects, the Committee decided that the object of effecting only limited, necessary amendments would be better achieved by taking as the basis of its discussions the Warsaw Convention itself rather than the Paris draft.

3. For convenience, the principal matters discussed by the Committee are treated in the following paragraphs under these heads:—

A. Scope of the Convention
B. Definition of "High Contracting Party" and "Territory"
C. Traffic documents
D. Negotiability of the air waybill (consignment note)
E. Limits of liability
F. Carriage of special cargo
G. Wilful misconduct
H. Liability of servants or agents of the carrier
I. Negligence in navigation
J. Miscellaneous.

This Report indicates the action taken by the Committee on each of these matters and, in general terms, the reason for such action. It must, of course, be appreciated that individual dele-

gations in many cases had stated their own special reasons for the attitude they adopted: these will be recorded in the minutes of the proceedings.

A. *Scope of the Convention*

4. The Convention, under Article 1, applies only to international carriage as there defined which, with one exception, means, in substance, carriage between two States parties to the Convention. The Committee considered certain proposals to extend the definition so as to include also carriage between States neither or only one of which is a party to the Convention. It noted, however, that the Convention was already widely accepted and that certain additional States intended to accede to it, a fact which would render any such extension as suggested of diminishing practical importance. The idea of extending the scope of the Convention received considerable support in the Committee. It was realized, however, that attempts to apply the provisions of the Conventions to carriage to or from States not bound by them would involve certain problems of private international law. Therefore, the Committee ultimately decided to recommend that no change be made in Article 1 of the Convention in regard to the scope of the Convention.

B. *Definition of "High Contracting Party" and "Territory"*

5. In Article 1 of the Convention, however, two other problems required action. First, the Convention uses the expression "High Contracting Parties" to describe not only States which have ratified or adhered to the Convention but also those which were original signatories of the Convention but have not ratified it. Secondly, the Convention was concluded between High Contracting Parties (Heads of States) in respect of their "territories", which expression (see Articles 1 and 40) was intended to signify all territories subject to the sovereignty, suzerainty, mandate or authority of a High Contracting Party. As a result of political developments since 1929, however, certain countries which were then included in the territories of the High Contracting Parties enumerated in the Preamble to the Convention have since attained independent international status. Further,

the implied definition of "territory" as mentioned above does not (and in 1929 could not) include territories subject to trusteeship. The Committee considered that the problems relating to "High Contracting Party" and "territory" would be resolved by adding a new article to the Convention defining these expressions (see Article XVII of the draft Protocol recommended by the Committee).

C. *Traffic documents*

6. Chapter II of the Warsaw Convention, in Articles 3 to 11, specifies requirements in great detail, particularly in Article 8, in regard to the contents of passenger tickets, baggage tickets and air waybills (consignment notes). Non-delivery of tickets or air waybills (consignment notes) or the omission of certain particulars therefrom entails the penalty of the carrier being deprived of defences and the limitation of liability. Inasmuch as air carriers experience difficulties in complying in every particular with these detailed requirements, and as such requirements are not sometimes fulfilled in the circumstances inseparable from speedy arrangements for air transportation, the Committee considered it to be expedient and also necessary that there should be a simplification of traffic documents required by the Convention. It was further considered to be undesirable that the requirements as to these matters should be defined in a convention: such international agreement as to the form of traffic documents as is needed should, in the view of the Committee, be reached by other methods which admit of more flexible adjustment to changing demands. Therefore, the Committee recommends that the Convention should lay down obligatory requirements only in two respects, namely that such documents should contain such particulars as would demonstrate that the carriage involved is international carriage within the meaning of the Convention and, secondly, that there should be a statement to the effect that the carriage is subject to the provisions of the Convention: the latter statement is required in order to bring to the notice of passengers that the Convention applies. If there is failure to comply with either of these two requirements, the carrier shall not be entitled to avail himself of any provisions which

limit his liability in respect of the passenger, registered baggage or cargo, as the case may be (see Articles III to IX of the draft Protocol).

7. The draft Protocol also contains provisions in respect of the passenger ticket and the baggage check similar to those already existing (in Article 11 of the Convention) in respect of the air waybill (consignment note) insofar as all these traffic documents would constitute *prima facie* evidence of the conclusion and conditions of the contract of carriage. In addition, they would, in the case of registered baggage, constitute *prima facie* evidence in respect of their registration. Certain practical considerations also indicate the need for changes in the text of the Convention in so far as it relates to the requirement that the passenger ticket and the baggage check shall be delivered by the carrier (without making allowance for the common practice of such acts to be performed by travel agents on behalf of the carrier): this matter is taken care of in the proposed re-wording of Articles 3(1) and 4(1) of the Convention. The wording suggested in relation to the delivery of tickets is also such as to permit of the delivery of family or group tickets. Further, an amendment of Article 6 of the Convention was considered necessary to enable the carrier to "accept" cargo for consignment without delivering immediately the air waybill (consignment note), since the practice in air transportation is that such air waybills (notes) are made out at appropriate offices of the carrier situated at a distance from the several places where cargo is accepted for air carriage.

8. A minor change of a legal character was also made in Article 10(2) relating to the liability of the consignor. It is now provided that the consignor shall be liable for all damage suffered by the carrier, or any other person to whom the carrier is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars or statements in the air waybill (consignment note). The qualifying words "to whom the carrier is liable" are an addition to the Warsaw text.

D. *Negotiability of the air waybill (consignment note)*

9. The Committee also considered the question of negotiability of the air waybill (consignment note). It, however, considered that work on the subject was not sufficiently advanced and that sufficient demand for the insertion of provisions relating to this matter had not yet been brought to the notice of the Committee to justify a recommendation that provisions relating to negotiability should be included in the draft Protcool. It therefore adopted a resolution that the matter be kept under separate study.

E. *Limits of liability*

10. An important aspect considered in relation to the question of revision of the Warsaw Convention was the economic one relating to the carrier's maximum liability in respect of the carriage of passengers (Article 22 of the Convention). In certain parts of the world, particularly the North American Continent, judicial awards of compensation for damage suffered by passengers, arising out of air carriage not governed by the Warsaw Convention, are often much higher than the maximum amount prescribed in Article 22 of the Convention. Consequently, views were expressed in the Committee that the existing limits of liability under the Convention should be increased. Another argument in support of this view was that the record of air safety had vastly improved since 1929 and therefore the carrier is now involved in lower risks than those prevailing in the earlier days of air transportation development, and consequently should be prepared to pay higher amounts on the fewer occasions of accidents. It was argued also that the cost of an increase, reflected in the additional insurance premiums payable, in relation to the cost of air transport generally, was small. On the other hand, some members of the Legal Committee stated that their governments considered the existing maximum limits of the Warsaw Convention to be satisfactory. The Committee also noted the study made by the Air Transport Committee of ICAO on the subject of limits of liability. The latter Committee was of the view that the value of the Poincaré franc specified in the Warsaw Convention is at present higher in certain parts of the

world, although it is somewhat lower in others, than in 1929. Before the Legal Committee, it was urged that the objective of an international convention intended to be applicable to all parts of the world must take into account the different economic and monetary conditions in different countries; also that the objective of such a convention should be to meet the average requirements of the average class of passenger using international air transport. If any passenger desired higher protection, he could, at very little cost, obtain insurance to cover related risks of air transport. Moreover, the requirements of such passenger should not in effect be subsidized by the average passenger who, if the limits of liability in the Convention were fixed at a high figure, would have to pay a higher fare (which would include a higher rate of premium paid by the carrier to the insurer in respect of passengers generally).

11. After a detailed study, the Air Transport Committee had come to the conclusion that a limited increase, namely up to 50% of the existing limits of liability specified in the Convention, would be justified in respect of death or injury to passengers and that in any case the present limits in respect of non-fatal injuries ought to be increased. On the other hand, with respect to baggage and cargo, that Committee was of the opinion that there was no necessity to alter the limits of the Warsaw Convention. Before the Legal Committee, no proposals were made for any increase in respect of baggage and cargo. But in respect of passengers there were several proposals for increase, the largest being for increasing the existing limit by 200%. Another proposal was that the present limit should be increased by 50% but that there should be another limit which should be applied against the carrier in certain circumstances (see letter (b) in paragraph 16), and that the second limit should be double the first. By a vote of 16 to 9, the Legal Committee decided that it would be appropriate to increase, in respect of passengers, the limit of liability specified in paragraph 1 of Article 22 of the Warsaw Convention by 50% (which would have had the effect of substituting 187,500 gold francs in place of 125,000 gold francs); but, in order to achieve a rational and acceptable round figure of liability, the Committee subsequently

decided by 15 votes to 8 that the existing limit of 125,000 gold francs should be increased to 200,000 gold francs (representing an increase of 60%). The latter decision is embodied in Article XI of the draft Protocol.

12. A related matter considered by the Committee was the conversion of the gold franc into national currencies. For this purpose the Committee decided to recommend adoption of the same formula as was embodied on this subject in the Convention relating to damage caused by foreign aircraft to third parties on the surface opened for signature at Rome on 7 October 1952 (see Article XI(c) of the draft Protocol).

13. An amendment which practical considerations indicated to be necessary was one concerning cases of loss, damage or delay of a part of registered baggage or cargo or of an article therein contained. A lacuna in this respect in the Warsaw Convention is to be filled by the insertion of a new provision numbered paragraph (2) in Article 22 of the Warsaw Convention (see Article XI(b) of the draft Protocol).

F. *Carriage of special cargo*

14. A difficulty experienced in actual practice was the absence of a provision in the Convention which would enable an air carrier to make special stipulations in regard to the risks of carrying cargo of special characteristics, such as live animals or goods suffering natural deterioration during carriage by air. A provision in this respect based upon analogous provisions of maritime law has therefore been proposed to be added to Article 23 of the Warsaw Convention (Article XII of the draft Protocol).

G. *Wilful misconduct (''dol'')*

15. According to Article 25(1) of the Warsaw Convention, the carrier cannot invoke the provisions of the Convention which exclude or limit his liability if the damage is caused by ''dol'' or by such default on his part as, in accordance with the law of the court seized of the case, is considered to be equivalent to ''dol''. The article has been much criticized. The Convention, being in French, uses the expression ''dol''. The

nearest equivalent to this in English has been regarded as "wilful misconduct", but even this concept does not completely coincide with the conception of "dol". Secondly, the expression 'default . . . equivalent to 'dol' " has been regarded as intended to cover cases of "faute lourde", but there is no corresponding concept of this in the Anglo-Saxon legal system where, consequently, attempts have been made either to conceive of it as "*gross* negligence", a concept foreign to English civil law, or to disregard altogether that part of Article 25(1) which refers to "default . . . equivalent to 'dol' ". Further, even in courts on the Continent, there has been no uniform interpretation of what constitutes "faute lourde". In any case, the provision of the article which leaves to different courts in different jurisdictions the function of defining what default is to be "considered to be equilvalent to 'dol' " carries the risk of conflicting interpretations on this point: and this is contrary to the objective of the Convention which is to ensure uniformity of rules on the subject. From the practical point of view these defects are of importance because of the tendency of claimants to evade the provisions of Article 22(1) and to attempt to benefit from the present imprecision of Article 25(1). Therefore, there was general agreement in the Committee that the article should be revised.

16. At an early stage of the session it was suggested that the question of limit (in Article 22) and that of cases in which no limit would apply (Article 25) should be considered together: a view expressed in this connection was that if some benefit was to be conferred on the passenger by raising the limit, a corresponding balance should appear in Article 25 in order that the carrier may be protected against litigation which is now possible because of the ambiguity of the present text of the article. One proposal in this connection was characterized by a suggestion of having two limits. The proposal was that—

(a) where the carrier fails to prove that he and his agents have taken all necessary measures to avoid the damage or that it was impossible to take them (Article 20(1)), the claim shall be subject to a specified limit which, specifically in relation to this entire proposal, was at one stage proposed to be raised from 125,000 gold francs by 50% and later by 100%;

(b) this limit would be doubled in cases where it is proved that the damage was caused by an act committed recklessly, not caring whether or not damage was likely to result; and

(c) where, however, the person suffering damage proved that it was caused by a deliberate act of the carrier, his servants or agents, done with intent to cause damage (unless with the object of avoiding greater damage), the liability shall not be subject to any limit.

The Committee, however, decided not to link, for the purpose of voting, the question of the limit of liability and that of the revision of Article 25. Therefore it determined first the question of the limit of liability (part (a) of the above proposal) and later rejected the rest of the proposal for amendment of Article 25 (3 votes for and 9 votes against).

17. The following proposals also were considered with regard to the revision of Article 25:

A. To substitute, for Article 25(1) and (2), the following:—

"The carrier shall be liable without limitation if the claimant proves:

(a) that the damage is caused by an act or omission of the carrier or of his servant or an agent of the carrier in the course of his employment; and

(b) that such act or omission was committed either with the intention to cause damage or recklessly by not caring whether or not damage was likely to result."

B. To delete from Article 25 the words "or by such default on his part as, in accordance with the law of the court seized of the case, is considered to be equivalent to wilful misconduct".

C. To substitute for paragraphs (1) and (2) of Article 25 the following:—

> "The limits of liability specified in Article 22 of this Convention shall not apply if it is proved that the damage resulted from a deliberate act or omission of the carrier, his servants or agents done with intent to cause damage; provided that, in the case of a deliberate act or omission of a servant or agent it is also proved that he was acting within the scope of his employment."

Of these proposals the last mentioned was adopted by the Committee after a rollcall vote, by 12 votes to 11 with 2 abstentions, subject to drafting changes. The only drafting change ultimately made was to substitute the words "in the course of his employment" for the words "within the scope of his employment". Thus, the Committee ultimately revised Article 25 of the Warsaw Convention almost in the same manner as this subject was determined in Article 12 of the Convention on Damage caused by Foreign Aircraft to Third Parties on the Surface which was opened for signature at Rome on 7 October 1952.

H. *Liability of servants or agents of the carrier*

18. In spite of provisions in the Warsaw Convention limiting the liability of the carrier (except in certain cases), the existing text would not preclude the possibility that efforts might be made by claimants to obtain from the carrier higher damages than those specified in the Convention by filing actions against the servant or agent of the carrier, upon the basis that no provision existed in the Convention limiting the liability of the servant or agent and upon the assumption that the carrier would indemnify such servant or agent. In order that the carrier may be protected against this kind of litigation and in order to protect the servants and agents of carriers, a new provision, Article 25A, as specified in Article XIV of the draft Protocol, has been recommended. It may be noted that provisions to a like effect exist in the Rome Convention of 1952 referred to above.

I. *Negligence in navigation*

19. Article 20, paragraph 2 of the Convention provides that in the carriage of cargo and baggage the carrier is not liable if he proves that the damage was caused by negligence in pilotage or navigation or handling of the aircraft. The Committee considered that it would be illogical to maintain that provision since it embodies a rule so completely different from that governing the carrier's liability in respect of passengers.

J. *Miscellaneous*

20. The Committee also recommended—

(a) that the provisions of paragraph (2) of Article 2 of the Convention relating to exclusion from the scope of the Convention of carriage undertaken for postal authorities should be revised in the manner specified in Article II of the draft Protocol;

(b) that the word "days" used in Article 35 of the Convention should be redefined in the manner proposed in Article XVI of the draft Protocol;

(c) that the provision in Article 34 of the Convention, which excludes from its scope carriage performed by way of experimental trial, should be eliminated, in view of the advanced state which air transport has attained, and that the Article should exclude from the Convention only carriage performed in extraordinary circumstances outside the normal scope of an air carrier's business.

21. At the final meeting, mention was made of the problem which would arise from the coexistence of two systems, namely the Warsaw Convention as modified by the proposed Protocol, and the Warsaw Convention alone. In this connection the following proposal was made:—

> "This Protocol shall apply to transportation as defined in Article 1 of the Convention, provided the points of departure and destination referred to therein shall be situated in the territory of a party or two parties to this Protocol".

No decision, however, was taken on the subject.

The Committee considered that the procedural provisions in the draft Protocol, including one relating to the number of ratifications necessary to bring the Protocol into effect, would best be determined in the proposed conference. The Committee, however, was of the view that the Protocol should not come into force unless a substantial proportion of the States parties to the Warsaw Convention ratified the Protocol.

EXHIBIT E

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enregistrés
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United Nations • Nations Unies
New York, 1965

No. 6943

FEDERAL REPUBLIC OF GERMANY, BELGIUM, BRAZIL, EGYPT, FRANCE, etc.

Protocol to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929. Done at The Hague, on 28 September 1955

Official texts: French, English and Spanish.

Registered by Poland on 30 September 1963.

RÉPUBLIQUE FÉDÉRALE D'ALLEMAGNE, BELGIQUE, BRÉSIL, ÉGYPTE, FRANCE, etc.

Protocole portant modification de la Convention pour l'unification de certaines règles relatives au transport aérien international signée à Varsovie le 12 octobre 1929. Fait à La Haye, le 28 septembre 1955

Textes officiels: française, anglais et espagnol.

Enregistré par la Pologne le 30 septembre 1963.

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No. 6943. PROTOCOLE[1] PORTANT MODIFICATION DE LA CONVENTION POUR L'UNIFICATION DE CERTAINES RÈGLES RELATIVES AU TRANSPORT AÉRIEN INTERNATIONAL SIGNÉE À VARSOVIE LE 12 OCTOBRE 1929[2]. FAIT À LA HAYE, LE 28 SEPTEMBRE 1955

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1 Entré en vigueur le 1er août 1963, le quatre-vingt-dixième jour après le dépôt du trentième instrument de ratification, conformément au paragraphe 1 de l'article XXII. Les instruments de ratification ont été déposés auprès du Gouvernement de la République populaire de Pologne aux dates suivantes:

Pologne	23	avril	1956
Égypte	26	avril	1956
Laos	9	mai	1956
El Salvador	17	septembre	1956
Luxembourg	13	février	1957
Union des Républiques socialistes soviétiques	25	mars	1957
Mexique	24	mai	1957
Hongrie	4	octobre	1957
Tchécoslovaquie	23	novembre	1957
Roumanie	3	décembre	1958
Yougoslavie	16	avril	1959
République démocratique allemande	19	mai	1959
France	19	mai	1959
Australie	23	juin	1959
Irlande	12	octobre	1959
République socialiste soviétique d'Ukraine	23	juin	1960
Venezuela	26	août	1960
Pays-Bas	21	septembre	1960
République fédérale d'Allemagne	27	octobre	1960
Pakistan	16	janvier	1961
République socialiste soviétique de Biélorussie	17	janvier	1961
Cameroun*	21	août	1961
Congo (Brazzaville)*	5	janvier	1962
Dahomey*	9	janvier	1962
Côte-d'Ivoire*	2	février	1962
Niger*	20	février	1962
Madagascar*	17	août	1962
Suisse	19	octobre	1962

* États qui se sont déclarés liés par la ratification de la France.

No. 6943. PROTOCOL[1] TO AMEND THE CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO INTERNATIONAL CARRIAGE BY AIR SIGNED AT WARSAW ON 12 OCTOBER 29.[2] DONE AT THE HAGUE, ON 28 SEPTEMBER 1955

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1 Came into force on 1 August 1963, the ninetieth day after the deposit of the thirtieth instrument of ratification, in accordance with article XXII. The instruments of ratification were deposited with the Government of the Polish People's Republic as follows:

Poland	23	April	1956
Egypt	26	April	1956
Laos	9	May	1956
El Salvador	17	September	1956
Luxembourg	13	February	1957
Union of Soviet Socialist Republics	25	March	1957
Mexico	24	May	1957
Hungary	4	October	1957
Czechoslovakia	23	November	1957
Romania	3	December	1958
Yugoslavia	16	April	1959
German Democratic Republic	19	May	1959
France	19	May	1959
Australia	23	June	1959
Ireland	12	October	1959
Ukrainian Soviet Socialist Republic	23	June	1960
Venezuela	26	August	1960
Netherlands	21	September	1960
Federal Repulic of Germany	27	October	1960
Pakistan	16	January	1961
Byelorussian Soviet Socialist Republic	17	January	1961
Cameroon*	21	August	1961
Congo (Brazzaville)*	5	January	1962
Dahomey*	9	January	1962
Ivory Coast*	2	February	1962
Niger*	20	February	1962
Madagascar*	17	August	1962
Switzerland	19	October	1962

* States which declared themselves bound by the ratification of France.

Les Gouvernements sous-signés

CONSIDÉRANT qu'il est souhaitable d'amender la Convention pour l'unification de certaines règles relatives au transport aérien international signée à Varsovie le 12 octobre 1929.[2]

SONT CONVENUS de ce qui suit:

CHAPITRE PREMIER

AMENDEMENTS À LA CONVENTION

Article premier

À l'article premier de la Convention—

a) l'alinéa 2 est supprimé et remplacé par la disposition suivante:

"2. Est qualifié *transport international*, au sens de la présente Convention, tout transport dans lequel, d'aprés les stipulations des parties, le point de départ et le point de desination, qu'il y ait ou non interruption de transport ou transbordement, sont situés soit sur le territoire de deux Hautes Parties Contractantes soit sur le territoire d'une seule Haute Partie Contractante si une escale est prévue sur le territoire d'un autre État, même si cet État n'est pas une Haute Partie Contractante. Le transport sans une telle escale entre deux points du territoire d'une seule Haute Partie Contractante n'est pas considéré comme international au sens de la présente Convention."

Danemark	3 mai	1963
Islande	3 mai	1963
Norvège	3 mai	1963
Suède	3 mai	1963
Italie	4 mai	1963

2 Société des Nations, *Recueil des Traités*, vol. CXXXVII, p. 11; vol. CXLII, p. 393; vol. CXLVII, p. 355; vol. CLVI, p. 258; vol. CLX, p. 418; vol. CLXIV, p. 395; vol. CLXXII, p. 245; vol. CLXXVII, p. 420; vol. CLXXXI, p. 397; vol. CLXXXV, p. 406; vol. CXCIII, p. 273; vol. CXCVI, p. 422; et Nations Unies, *Recueil des Traités*, vol 261, p. 243, et vol. 266, p. 444.

The Governments undersigned

CONSIDERING that it is desirable to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929,[2]

HAVE AGREED as follows:

CHAPTER I

AMENDMENTS TO THE CONVENTION

Article I

In Article 1 of the Convention—

a) paragraph 2 shall be deleted and replaced by the following:

"2. For the purposes of this Convention, the expression *international carriage* means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two High Contracting Parties or within the territory of a single High Contracting Party if there is an agreed stopping place within the territory of another State, even if that State is not a High Contracting Party. Carriage between two points within the territory of a single High Contracting Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention."

Denmark	3 May	1963
Iceland	3 May	1963
Norway	3 May	1963
Sweden	3 May	1963
Italy	4 May	1963

2 League of Nations, *Treaty Series*, Vol. CXXXVII, p. 11; Vol. CXLII, p. 393; Vol. CXLVII, p. 355; Vol. CLVI, p. 258; Vol. CLX, p. 418; Vol. CLXIV, p. 395; Vol. CLXXII, p. 425; Vol. CLXXVII, p. 420; Vol. CLXXXI, p. 397; Vol. CLXXXV, p. 406; Vol. CXCIII, p. 273; Vol. CXCVI, p. 422; and United Nations, *Treaty Series*, Vol. 261, p. 423, and Vol. 266, p. 444.

b) l'alinéa 3 est supprimé et remplacé par la disposition suivante:

"3. Le transport à exécuter par plusieurs transporteurs par air successifs est censé constituer pour l'application de la présente Convention un transport unique lorsqu'il a été envisagé par les parties comme une seule opération, qu'il ait été conclu sous la forme d'un seul contrat ou d'une série de contrats, et il ne perd pas son caractère international par le fait qu'un seul contrat ou une série de contrats doivent être exécutés intégralement dans le territoire d'un même État."

Article II

À l'article 2 de la Convention—

l'alinéa 2 est supprimé et remplacé par la disposition suivante:

"2. La présente Convention ne s'applique pas au transport du courrier et des colis postaux."

Article III

À l'article 3 de la Convention—

a) l'alinéa 1er est supprimé et remplacé par la disposition suivante:

"1. Dans le transport de passagers, un billet de passage doit être délivré, contenant:

a) l'indication des points de départ et de destination;

b) si les points de départ et de destination sont situés sur le territoire d'une même Haute Partie Contractante et qu'une ou plusieurs escales soient prévues sur le territoire d'un autre État, l'indication d'une de ces escales;

c) un avis indiquant que si les passagers entreprennent un voyage comportant une destination finale ou une escale dans un pays autre que le pays de départ, leur transport peut être régi par la Convention de Varsovie qui, en général, limite la responsabilité du transporteur en cas de mort ou de lésion corporelle, ainsi qu'en cas de perte ou d'avarie des bagages."

b) paragraph 3 shall be deleted and replaced by the following:

"3. Carriage to be performed by several successive air carriers is deemed, for the purposes of this Convention, to be one undivided carriage if it has been regarded by the parties as a single operation, whether it had been agreed upon under the form of a single contract or a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State."

Article II

In Article 2 of the Convention—

paragraph 2 shall be deleted and replaced by the following:

"2. This Convention shall not apply to carriage of mail and postal packages."

Article III

In Article 3 of the Convention—

a) paragraph 1 shall be deleted and replaced by the following:

"1. In respect of the carriage of passengers a ticket shall be delivered containing:

a) an indication of the places of departure and destination;

b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place;

c) a notice to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage."

b) l'aninéa 2 est supprimé et remplacé par la disposition suivante:

"2. Le billet de passage fiat foi, jusqu'à preuve contraire, de la conclusion et des conditions du contrat de transport. L'absence, l'irrégularité ou la perte du billet n'affecte ni l'existence ni la validité du contrat de transport, qui n'en sera pas moins soumis aux règles de la présente Convention. Toutefois, si, du consentement du transporteur, le passager s'embarque sans qu'un billet de passage ait été délivré, ou si le billet ne comporte pas l'avis prescrit à l'alinéa 1 *c*) du présent article, le transporteur n'aura pas le droit de se prévaloir des dispositions de l'article 22."

Article IV

À l'article 4 de la Convention—

a) les alinéas 1, 2 et 3 sont supprimés et remplacés par la disposition suivante:

"1. Dans le transport de bagages enregistrés, un bulletin de bagages doit être délivré qui, s'il n'est pas combiné avec un billet de passage conforme aux dispositions de l'article 3, alinéa 1er, ou n'est pas inclus dans un tel billet, doit contenir:

a) l'indication des points de départ et de destination;

b) si les points de départ et de destination soint situés sur le territoire d'une même Haute Partie Contractante et qu'une ou plusieurs escales soient prévues sur le territoire d'un autre État, l'indication d'une de ces escales;

c) un avis indiquant que, si le transport comporte une destination finale ou une escale dans un pays autre que le pays de départ, il peut être régi par la Convention de Varsovie qui, en général, limite la responsabilité du transporteur en cas de perte ou d'avarie des bagages."

b) paragraph 2 shall be deleted and replaced by the following:

"2. The passenger ticket shall constitute *prima facie* evidence of the conclusion and conditions of the contract of carriage. The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage which shall, none the less, be subject to the rules of this Convention. Nevertheless, if, with the consent of the carrier, the passenger embarks without a passenger ticket having been delivered, or if the ticket does not include the notice required by paragraph 1 *c*) of this Article, the carrier shall not be entitled to avail himself of the provision of Article 22."

Article IV

In Article 4 of the Convention—

a) paragraphs 1, 2 and 3 shall be deleted and replaced by the following:

"1. In respect of the carriage of registered baggage, a baggage check shall be delivered, which, unless combined with or incorporated in a passenger ticket which complies with the provisions of Article 3, paragraph 1, shall contain:

a) an indication of the places of departure and destination;

b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place;

c) a notice to the effect that; if the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers in respect of loss or damage to baggage."

b) l'alinéa 4 est supprimé et remplacé par la disposition suivante:

"2. Le bulletin de bagages fait foi, jusqu'à preuve contraire, de l'enregistrement des bagages et des conditions du contrat de transport. L'absence, l'irrégularité ou la perte du bulletin n'affecte ni l'existence ni la validité du contrat de transport, qui n'en sera pas moins soumis aux règles de la présente Convention. Toutfois, si le transporteur accepte la garde des bagages sans qu'un bulletin ait été délivré ou si, sans le cas où le bulletin n'est past combiné avec un billet de passage conforme aux dispositions de l'article 3, alinéa 1 *c*), ou n'est pas inclus dans un tel billet, il ne comporte pas l'avis prescrit à l'alinéa 1 *c*) du présent article, le transporteur n'aura pas le droit de prévaloir des dispositions de l'article 22, alinéa 2."

Article V

À l'article 6 de la Convention—

l'alinéa 3 est supprimé et remplacé par la disposition suivante:

"3. La signature du transporteur doit être apposée avant l'embarquement de la marchandise à bord de l'aéronef."

Article VI

L'article 8 de la Convention est supprimé et remplacé par la disposition suivante:

"La lettre de transport aérien doit contenir:

a) l'indication des points de départ et de destination;

b) si les points de départ et de destination sont situés sur le territoire d'une même Haute Partie Contractante et qu'une ou plusieurs escales soient prévues sur la territoire d'une autre État, l'indication d'une de ces escales;

b) paragraph 4 shall be deleted and replaced by the following:

"2. The baggage check shall constitute *prima facie* evidence of the registration of the baggage and of the conditions of the contract of carriage. The absence, irregularity or loss of the baggage check does not affect the existence or the validity of the contract of carriage which shall, none the less, be subject to the rules of this Convention. Nevertheless, if the carrier takes charge of the baggage without a baggage check having been delivered or if the baggage check (unless combined with or incorporated in the passenger ticket which complies with the provisions of Article 3, paragraph 1 *c*)) does not include the notice required by paragraph 1 *c*) of this Article, he shall not be entitled to avail himself of the provisions of Article 22, paragraph 2."

Article V

In Article 6 of the Convention—

paragraph 3 shall be deleted and replaced by the following:

"3. The carrier shall sign prior to the loading of the cargo on board the aircraft."

Article VI

Article 8 of the Convention shall be deleted and replaced by the following:

"The air waybill shall contain:

a) an indication of the places of departure and destination:

b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place;

c) un avis indiquant aux expéditeurs que, si le transport comporte une destination finale ou une escale dans un pays autre que le pays de départ, il peut être régi par la Convention de Varsovie qui, en général, limite la responsabilité ds transporteurs en cas de perte ou d'avarie des marchandises.''

Article VII

L'article 9 de la Convention est supprimé et remplacé par la dispositions suivante:

''Si, du consentement du transportuer, des marchandises sont embarquées à bord de l'aéronef sans qu'une lettre de transport aérien ait été établie ou si celle-ci ne comporte pas l'avis prescrit à l'article 8, alinéa *c*) le transporteur n'aura pas le droit de se prévaloir des dispositions de l'article 22, alinéa 2.''

Article VIII

À l'article 10 de la Convention—

l'alinéa 2 est supprimé et remplacé par la disposition suivante:

''2. Il supportera la responsabilité de tout dommage subi par la transporteur ou par toute autre personne à l'égard de laquelle la responsabilité du transporteur est engagée à raison de ses indications et déclarations irrégulières, inexactes ou incomplètes.''

Article IX

À l'article 15 de la Convention—

l'alinéa suivant est inséré:

''3. Rien dans la présente Convention n'empêche l'établissement d'une lettre de transport aérien négociable.''

Article X

L'alinéa 2 de l'article 20 de la Convention est supprimé.

c) a notice to the consignor to the effect that, if the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers in respect of loss of or damage to cargo.''

Article VII

Article 9 of the Convention shall be deleted and replaced by the following:

''If, with the consent of the carrier, cargo is loaded on board the aircraft without an air waybill having been made out, or if the air waybill does not include the notice required by Article 8, paragraph *c*), the carrier shall not be entitled to avail himself of the provisions of Article 22, paragraph 2.''

Article VIII

In Article 10 of the Convention—

paragraph 2 shall be deleted and replaced by the following:

''2. The consignor shall indemnify the carrier against all damage suffered by him, or by any other person to whom the carrier is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements furnished by the consignor.''

Article IX

To Article 15 of the Convention—

the following paragraph shall be added:

''3. Nothing in this Convention prevents the issue of a negotiable air waybill.''

Article X

Paragraph 2 of Article 20 of the Convention shall be deleted.

Article XI

L'article 22 de la Convention est supprimé et remplacé par les dispositions suivantes:

"Article 22

1. Dans le transport des personnes, la responsabilité du transporteur relative à chaque passager est limitée à la somme de deux cent cinquante mille francs. Dans le cas où, d'après la loi du tribunal saisi, l'indemnité peut être fixée sous forme de rente, le capital de la rente ne peut dépasser cette limite. Toutefois par une convention spéciale avec le transporteur, le passager pourra fixer une limite de responsabilité plus élevée.

2. *a*) Dans le transport de bagages enregistrés et de marchandises, la responsabilité du transporteur est limitée à la somme de deux cent cinquante francs par kilogramme, sauf déclaration spéciale d'intérêt à la livraison faite par l'expéditeur au moment de la remise du colis au transporteur et moyennant le paiement d'une taxe supplémentaire éventuelle. Dans ce cas, le transporteur sera tenu de payer jusqu'à concurrence de la somme déclarée, à moins qu'il ne prouve qu'elle est supérieure à l'intérêt réel de l'expéditeur à la livraison.

b) En cas de perte, d'avarie ou de retard d'une partie des bagages enrigestrés ou des marchandises, ou de tout objet qui y est contenu, seul le poids total du ou des colis dont il s'agit est pris en considération pour déterminer la limite de responsabilité du transporteur. Toutefois, lorsque la perte, l'avarie ou le retard d'une partie des bagages enregistrés ou des marchandises, ou d'un object qui y est contenu, affecte la valeur d'autres colis couverts par le même bulletin de bagages ou la même lettre de transport aérien, le poids total de ces colis doit être pris en considération pour déterminer la limite de responsabilité.

Article XI

Article 22 of the Convention shall be deleted and replaced by the following:

"Article 22

1. In the carriage of persons the liability of the carrier for each passenger is limited to the sum of two hundred and fifty thousand francs. Where, in accordance with the law of the court seised of the case, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed two hundred and fifty thousand francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

2. *a*) In the carriage of registered baggage and of cargo, the liability of the carrier is limited to a sum of two hundred and fifty francs per kilogramme, unless the passenger or consignor has made, at the time when the package was handed over to the carrier a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the passenger's or consignor's actual interest in delivery at destination.

b) In the case of loss, damage or delay of part of registered baggage or cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the loss, damage or delay of a part of the registered baggage or cargo, or of an object contained therein, affects the value of other packages covered by the same baggage check or the same air waybill, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.

3. En ce qui concerne les objets dont le passager conserve la garde, la responsabilité du transporteur est limitée à cinq mille francs par passager.

4. Les limites fixées par le présent article n'ont pas pour effet d'enlever au tribunal la faculté d'allouer en outre, conformément à sa loi, une somme correspondant à tout ou partie des dépens et autres frais du procès exposés par le demandeur. La disposition précédente ne s'applique pas lorsque le montant de l'indemnité allouée, non compris les dépens et autres frais de procès, ne dépasse pas la somme que le transporteur a offerte par écrit au demandeur dans un délai de six mois à dater du fait qui a causé le dommage ou avant l'introduction de l'instance si celle-ci est postérieure à ce délai.

5. Les sommes indiquées en francs dans le présent article sont considérées comme sa rapportant à une unité monétaire constituée par soixante-cinq milligrammes et demi d'or au titre de neuf cents millièmes de fin. Ces sommes peuvent être converties dans chaque monnaie nationale en chiffres ronds. La conversation de ces sommes en monnaies nationales autres que la monnaie-or s'affectuera en cas d'instance judiciaire suivant la valeur-or de ces monnaies à la date du jugement."

Article XII

À l'article 23 de la Convention, la disposition actuelle devient l'alinéa 1er, et l'alinéa 2 suivant est ajouté:

"2. L'alinéa 1er du présent article ne s'applique pas aux clauses concernant la perte ou le dommage résultant de la nature ou du vice propre des marchandises transportées."

Article XIII

A l'article 25 de la Convention—

les alinéas 1 et 2 sont supprimés et remplacés par la disposition suivante:

3. As regards objects of which the passenger takes charge himself the liability of the carrier is limited to five thousand francs per passenger.

4. The limits prescribed in this article shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and of the other expenses of the litigation incurred by the plaintiff. The foregoing provision shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later.

5. The sums mentioned in francs in this Article shall be deemed to refer to a currency unit consisting of a sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. These sums may be converted into national currencies in round figures. Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of judgment."

Article XII

In Article 23 of the Convention, the existing provision shall be numbered as paragraph 1 and another paragraph shall be added as follows:

"2. Paragraph 1 of this Article shall not apply to provisions governing loss or damage resulting from the inherent defect, quality or vice of the cargo carried."

Article XIII

In Article 25 of the Convention—

paragraphs 1 and 2 shall be deleted and replaced by the following:

"Les limites de responsabilité prévues à l'article 22 ne s'appliquent pas s'il est prouvé que le dommage résulte d'un acte ou d'une ommission du transporteur ou de ses préposés fait, soit avec l'intention de provoquer un dommage, soit témérairement et avec conscience qu'un dommage en résultera probablement, pour autant que, dans le cas d'un acte ou d'une omission de préposés, la prevué soit également apportée que ceux-ci ont agi dans l'exercice de leur fonctions."

Article XIV

Après l'article 25 de la Convention, l'article suivant est inséré:

"Article 25 A

1. Si une action est intentée contre un préposé du transporteur à la suite d'un dommage visé par la présente Convention, ce préposé, s'il prouve qu'il a agi dans l'exercise de ses fonctions, pourra se prévaloir des limites de responsabilité que peut invoquer ce transporteur en vertu de l'article 22.

2. Le montant total de la réparation qui, dans ce cas, peut être obtenu du transporteur et de ses préposés ne doit pas dépasser lesdites limites.

3. Les dispositions des alinéas 1 et 2 du présent article ne s'appliquent pas s'il prouvé que le dommage résulte d'un acte ou d'une omission du préposé fait, soit avec l'intention de provoquer un dommage, soit témérairement et avec conscience qu'un dommage en résultera probablement."

Article XV

À l'article 26 de la Convention—

l'alinéa 2 est supprimé et remplacé par la disposition suivante:

"The limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such an act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment."

Article XIV

After Article 25 of the Convention, the following article shall be inserted:

"Article 25 A

1. If an action is brought against a servant or agent of the carrier arising out of damage to which this Convention relates, such servant or agent, if he proves that he acted within the scope of his employment, shall be entitled to avail himself of the limits of liability which that carrier himself is entitled to invoke under Article 22.

2. The aggregate of the amounts recoverable from the carrier, his servants and agents, in that case, shall not exceed the said limits.

3. The provisions of paragraphs 1 and 2 of this article shall not apply if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result."

Article XV

In Article 26 of the Convention—

paragraph 2 shall be deleted and replaced by the following:

"2. En cas d'avarie, le destinataire doit adresser au transporteur une protestation immédiatement après la découverte de l'avarie et, au plus tard, dans un délai de sept jours pour les bagages et de quatorze jours pour les marchandises à dater de leur réception. En cas de retard, la protestation devra êtra faite au plus tard dans les vingt et un jours à dater du jour où le bagage ou la marchandise auront été mis à sa disposition."

Article XVI

L'article 34 de la Convention est supprimé et remplacé par la disposition suivante:

"Les dispositions des articles 3 à 9 inclus relatives aux titres de transport ne sont pas applicables au transport effectué dans des circonstances extraordinaires en dehors de tout opération normale de l'exploitation aérienne."

Article XVII

Après l'article 40 de la Convention, l'article suivante est inséré:

"Article 40 A

1. À l'article 37, alinéa 2 et à l'article 40, alinéa 1er, l'expression *Haute Partie Contractante* signifié *État*. Dans tous les autres cas, l'expression *Haute Partie Contractante* signifie un État dont la ratification ou l'adhésion à la Convention a pris effet et dont la dénonciation n'a pas pris effet.

2. Aux fins de la Convention, le mot *territoire* signifie non seulement le territoire métropolitain d'un État, mais aussi tous les territoires qu'il représente dans les relations extérieures."

"2. In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt in the case of baggage and fourteen days from the date of receipt in the case of cargo. In the case of delay the complaint must be made at the latest within twenty-one days from the date on which the baggage or cargo have been placed at his disposal."

Article XVI

Article 34 of the Convention shall be deleted and replaced by the following:

"The provisions of Articles 3 to 9 inclusive relating to documents of carriage shall not apply in the case of carriage performed in extraordinary circumstances outside the normal scope of an air carrier's business."

Article XVII

After Article 40 of the Convention, the following Article shall be inserted:

"Article 40 A

1. In Article 37, paragraph 2 and Article 40, paragraph 1, the expression *High Contracting Party* shall mean *State*. In all other cases, the expression *High Contracting Party* shall mean a State whose ratification of or adherence to the Convention has become effective and whose denunciation thereof has not become effective.

2. For the purposes of the Convention the word *territory* means not only the metropolitan territory of a State but also all other territories for the foreign relations of which that State is responsible."

CHAPITRE II

CHAMP D'APPLICATION DE LA CONVENTION AMENDÉE

Article XVIII

La Convention amendée par le présent protocole s'applique au transport international défini à l'article premier de la Convention lorsque les points de départ et de destination sont situés soit sur le territoire de deux États parties au présent protocole, soit sur le territoire d'un seul État partie au présent protocole si une escale est prévue dans le territoire d'un autre État.

CHAPITRE III

DISPOSITIONS PROTOCOLAIRES

Article XIX

Entre les Parties au présent Protocole, la Convention et le Protocole seront considérés et interprétés comme un seul et même instrument et seront dénommés *Convention de Varsovie amendée à la Haye en 1955*.

Article XX

Jusqu'à sa date d'entrée en vigeur conformément aux dispositions de l'article XXII, alinéa 1er, le présent Protocole restera ouvert à la signature à tout État qui aura ratifié la Convention ou y aura adhéré, ainsi qu'à tout État ayant participé à la Conférence à laquelle ce Protocole a été adopte.

Article XXI

1. Le présent Protocole sera soumis à la ratification des États signataires.

2. La ratification du présent Protocole par un État qui n'est pas partie à la Convention emporte adhésion à la Convention amendée par ce Protocole.

CHAPTER II

SCOPE OF APPLICATION OF THE CONVENTION AS AMENDED

Article XVIII

The Convention as amended by this Protocol shall apply to international carriage as defined in Article 1 of the Convention, provided that the places of departure and destination referred to in that Article are situated either in the territories of two parties to this Protocol or within the territory of a single party to this Protocol with an agreed stopping place within the territory of another State.

CHAPTER III

FINAL CLAUSES

Article XIX

As between the Parties to this Protocol, the Convention and the Protocol shall be read and interpreted together as one single instrument and shall be known as the *Warsaw Convention as amended at The Hague, 1955*.

Article XX

Until the date on which this Protocol comes into force in accordance with the provisions of Article XXII, paragraph 1, it shall remain open for signature on behalf of any State which up to that date has ratified or adhered to the Convention or which has participated in the Conference at which this Protocol was adopted.

Article XXI

1. This Protocol shall be subject to ratification by the signatory States.

2. Ratification of this Protocol by any State which is not a Party to the Convention shall have the effect of adherence to the Convention as amended by this Protocol.

3. Les instruments de ratification seront déposés auprès du Gouvernement de la République Populaire de Pologne.

Article XXII

1. Lorsque le présent Protocole aura réuni les ratifications de trente États signataires, il entrera en vigure entre ces États le quatre-vingt-dixième jour après le dépôt du trentième instrument de ratification. À l'égard de chaque État qui le ratifiera par la suite, il entrera en vigueur le quatre-vingt-dixième jour après le dépôt de son instrument de ratification.

2. Dès son entrée en vigeur, le présent Protocole sera enregistré auprès de l'Organisation des Nations Unies par le Gouvernement de la République Populaire de Pologne.

Article XXIII

1. Après son entrée en vigeur, le présent Protocole sera ouvert à l'adhésion de tout État non signataire.

2. L'adhésion au présent Protocole par un État qui n'est pas partie à la Convention emporte adhésion à la Convention amendée par le présent Protocole.

3. L'adhésion sera effectuée par le dépôt d'un instrument d'adhésion auprès du Gouvernement de la République Populaire de Pologne et produira ses effets le quatre-vingt-dixième jour après ce dépôt.

Article XXIV

1. Toute Partie au présent Protocole pourra le dénoncer par une notification faite au Gouvernement de la Républiqe Populaire de Pologne.

2. La dénonciation produira ses effets six mois après la date de réception par le Gouvernement de la République Populaire de Pologne de la notification de dénonciation.

3. Entre les parties au présent Protocole, la dénonciation de la Convention par l'une d'elles en vertu de l'article 39 ne doit pas être interprétée comme une dénonciation de la Convention amendée par le présent Protocole.

3. The instruments of ratification shall be deposited with the Government of the People's Republic of Poland.

Article XXII

1. As soon as thirty signatory States have deposited their instruments of ratification of this Protocol, it shall come into force between them on the ninetieth day after the deposit of the thirtieth instrument of ratification. It shall come into force for each State ratifying thereafter on the ninetieth day after the deposit of its instrument of ratification.

2. As soon as this Protocol comes into force it shall be registered with the United Nations by the Government of the People's Republic of Poland.

Article XXIII

1. This Protocol shall, after it has come into force, be open for adherence by any non-signatory State.

2. Adherence to this Protocol by any State which is not a Party to the Convention shall have the effect of adherence to the Convention as amended by this Protocol.

3. Adherence shall be effected by the deposit of an instrument of adherence with the Government of the People's Republic of Poland and shall take effect on the ninetieth day after the deposit.

Article XXIV

1. Any Party to this Protocol may denounce the Protocol by notification addressed to the Government of the People's Republic of Poland.

2. Denunciation shall take effect six months after the date of receipt by the Government of the People's Republic of Poland of the notification of denunciation.

3. As between the Parties to this Protocol, denunciation by any of them of the Convention in accordance with Article 39 thereof shall not be construed in any way as a denunciation of the Convention as amended by this Protocol.

Article XXV

1. Le présent Protocole s'appliquera à tous les territoires qu'un État partie à ce Protocole représente dans les relations extérieures, à l'exception des territoires à l'égard desquels une déclaration a été fait conformément a l'alinéa 2 du présent article.

2. Tout État pourra, au moment du dépôt de son instrument de ratification ou d'adhésion, déclarer que son acceptation du présent Protocole ne vise pas un ou plusiers des territoires qu'il représente dans les relations extérieures.

3. Tout État pourra par la suite notifier au Gouvernement de la République Populaire de Pologne que le présent Protocole s'appliquera à un ou plusieurs des territoires ayant fait l'objet de la déclaration prévue à l'alinéa 2 du présent article. Cette notification produira ses effets le quatre-vingt-dixième jour après la date de sa réception par ce Gouvernement.

4. Tout État partie a ce Protocole pourra, conformément aux dispositions de l'article XXIV, alinéa 1[er], dénoncer le présent Protocole séparément pour tous ou pour l'un quelconque des territoires qu'il représente dans les relations extérieures.

Article XXVI

Il ne sera admis aucune réserve au présent Protocole. Toutefois, un État pourra à tout moment déclarer par notification faite au Gouvernement de la République Populaire de Pologne que la Convention amendée par le présent Protocole ne s'appliquera pas au transport de personnes, de marchandises et de bagages effectué pour ses autorités militaires à bord d'aéronefs immatriculés dans ledit État et dont la capacité entière a été réservée par ces autorités ou pour le compte de celles-ci.

Article XXV

1. This Protocol shall apply to all territories for the foreign relations of which a State Party to this Protocol is responsible, with the exception of territories in respect of which a declaration has been made in accordance with paragraph 2 of this Article.

2. Any State may, at the time of deposit of its instrument of ratification or adherence, declare that its acceptance of this Protocol does not apply to any one or more of the territories for the foreign relations of which such State is responsible.

3. Any State may subsequently, by notification to the Government of the People's Republic of Poland, extend the application of this Protocol to any or all of the territories regarding which it has made a declaration in accordance with paragraph 2 of this Article. The notification shall take effect on the ninetieth day after its receipt by that Government.

4. Any State Party to this Protocol may denounce it, in accordance with the provisions of Article XXIV, paragraph 1, separately for any or all of the territories for the foreign relations of which such State is responsible.

Article XXVI

No reservation may be made to this Protocol except that a State may at any time declare by a notification addressed to the Government of the People's Republic of Poland that the Convention as amended by this Protocol shall not apply to the carriage of persons, cargo and baggage for its military authorities on aircraft, registered in that State, the whole capacity of which has been reserved by or on behalf of such authorities.

Article XXVII

Le Gouvernement de la République Populaire de Pologne notifiera immédiatement aux Gouvernements de tous les États signataires de la Convention ou du présent Protocole, de tous les États parties à la Convention ou au présent Protocole, et de tous les États membres de l'Organisation de l'Aviation civile internationale ou de l'Organisation des Nations Unies, ainsi qu'à l'Organisation de l'Aviation civile internationale:

a) toute signature du présent Protocole et la date de cette signature;

b) le dépôt de tout instrument de ratification du présent Protocole ou d'adhésion à ce dernier et la date de ce dépôt;

c) la date à laquelle le présent Protocole entre en vigeur conformément a l'alinéa 1er de l'article XXII;

d) la réception de toute notification de dénonciation et la date de réception;

e) la réception de toute déclaration ou notification faite en vertu de l'article XXV et la date de réception; et

f) la réception de toute notification faite en vertu de l'article XXVI et la date de réception.

EN FOI DE QUOI les Plénipotentiaires soussignés, dûment autorisés, ont singé le présent Protocole.

FAIT à la Haye le vingt-huitiéme jour du mois de septembre de l'anée mil neuf cent cinquante-cinq, en trois textes authentiques rédigés dans les langues français, anglaise et espagnole. En cas de divergence, le texte en langue française, langue dans laquelle la Convention avait été rédigée, fera foi.

Article XXVII

The Government of the People's Republic of Poland shall give immediate notice to the Governments of all States signatories to the Convention or this Protocol, all States Parties to the Convention or this Protocol, and all State Members of the International Civil Aviation Organization or of the United Nations and to the International Civil Aviation Organization:

a) of any signature of this Protocol and the date thereof;

b) of the deposit of any instrument of ratification or adherence in respect of this Protocole and the date thereof;

c) of the date on which this Protocol comes into force in accordance with Article XXII, paragraph 1;

d) of the receipt of any notification of denunciation and the date thereof;

e) of the receipt of any declaration or notification made under Article XXV and the date thereof; and

f) of the receipt of any notification made under Article XXVI and the date thereof.

IN WITNESS WHEREOF the undersigned Plenipotentiaires, having been duly authorized, have signed this Protocol.

DONE at The Hague on the twenty-eighth day of the month of September of the year One Thousand Nine Hundred and Fifty-five, in three authentic texts in the English, French and Spanish languages. In the case of any inconsistency, the text in the French language, in which the language of the Convention was drawn up, shall prevail.

Le présent Protocole sera déposé auprès du Gouvernement de la République Popularie de Pologne où, conformément aux dispositions de l'article XX, il restera ouvert à la signature, et ce Gouvernement transmettra des copies certifiées du présent Protocole aux Gouvernements de tous les États signataires de la Convention ou du présent Protocole, de tous les États parties à la Convention ou au présent Protocole, et de tous les États membres de l'Organisation de l'Aviation civile internationale ou de l'Organisation des Nations Unies, ainsi qu'à l'Organisation de l'Aviation civile internationale.

This Protocol shall be deposited with the Government of the People's Republic of Poland with which, in accordance with Article XX, it shall remain open for signature, and that Government shall send certified copies thereof to the Governments of all States signatories to the Convention or this Protocol, all States Parties to the Convention or this Protocol, and all States Members of the International Civil Aviation Organization or of the United Nations, and to the International Civil Aviation Organization.

EXHIBIT F

DEPARTMENT OF STATE
FOR THE PRESS

November 15, 1965 No. 268

The United States today gave formal notice of denunciation of the Warsaw Convention on the Unification of Certain Rules Relating to International Transportation by Air.

The Warsaw Convention was signed in 1929 and entered into force for the United States in 1934. The principal effect of the Convention is to limit the liability of air carriers for personal injury or death of passengers in international air transportation to approximately $8,300 per passenger in most cases. The Convention was amended by a Protocol signed at the Hague in 1955 which raised the limits of liability to approximately $16,600 per passenger, but the United States has never ratified this Protocol.

Today's action was taken under Article 39 of the Convention, which provides that any member country may denounce the Convention upon six months' notice. The notification carries out a decision, made known previously, that the United States would give notice of denunciation of the Warsaw Convention on November 15, unless by that time satisfactory provisional arrangements for the protection of international air passengers had been worked out among the principal international air carriers. A plan for a provisional arrangement whereby the international carriers serving the United States would waive their limits of liability up to $50,000 per passenger was recently proposed by the International Air Transport Association. However, the IATA proposal would have applied only to transportation to and from the United States covered by the Hague Protocol. Since the United States has not ratified the Hague Protocol, the IATA proposal would thus have been inapplicable to the great majority of United States travelers. In addition, it was felt that a ceiling of only $50,000 on recovery

by victims of air disasters would not justify continued adherence by the United States to the Warsaw Convention.

The United States would be prepared to withdraw the notice of denunciation deposited today if prior to its effective date of May 15, 1966 there is a reasonable prospect of an international agreement on limits of liability in international air transportation in the area of $100,000 per passenger or on uniform rules but without any limit of liability, and if, pending the effectiveness of such international agreement, there is a provisional arrangement among the principal international air lines waiving the limits of liability up to $75,000 per passenger.

As stated in the note delivered today by the American Embassy in Warsaw to the Polish Government, the United States wishes to make clear that the action to denounce the Warsaw Convention is taken solely because of the Convention's low limits of liability for injury or death to passengers, and in no way represents a departure from the long-standing commitment of the United States to the tradition of international cooperation in matters relating to civil aviation.

In this connection, the United States notes that the Council of the International Civil Aviation Organization has called an international conference in Montreal beginning on February 1, 1966 to consider revision of the limits of liability for passengers under the Warsaw Convention. The United States welcomes the recognition by ICAO of the need to reconsider the question of compensation to victims of international air disasters. The United States will participate fully in the Montreal Conference, and hopes that it will be possible to arrive at an international consensus on this important question.

The full text of the notice of denunciation is as follows:

"Excellency:

I have the honor, under instructions from my Government, to give formal notification to the Government of the Polish People's Republic of the denunciation by the Government of the United States of America, for itself, its territories, and all other areas under its sovereignty or authority, of the Conven-

tion for the Unification of Certain Rules relating to International Transportation by Air and the Additional Protocol relating thereto signed at Warsaw on October 12, 1929. This notification is given in accordance with the provisions of Article 39 of the Convention.

"The United States of America wishes to state that it gives this notification solely because of the low limits of liability for death or personal injury provided in the Warsaw Convention, even as those limits would be increased by the Protocol to amend the Convention done at The Hague on September 28, 1955.

"My Government would appreciate it if the Government of the Polish People's Republic would inform the Government of each of the High Contracting Parties to the Convention of this notification and the reason therefor. My Government would also appreciate it if the Government of the Polish People's Republic would inform the Government of the High Contracting Parties that the United States of America wishes to make clear its continued desire to maintain its tradition of international cooperation in matters relating to civil aviation. To this end, the United States of America stands ready to participate in the negotiation of a revision of the Warsaw Convention which would provide substantially higher limits, or of a convention covering the other matters contained in the Warsaw Convention and Hague Protocol but without limits of liability for personal injury or death."

* * *

EXHIBIT G

DEPARTMENT OF STATE
FOR THE PRESS

May 13, 1966 No. 110

The Department of State, in consultation and with the concurrence of the Civil Aeronautics Board, the Federal Aviation Agency, the Department of Commerce, and the Department of Defense, has concluded that the interests of the United States travelling public and of international civil aviation would be best served by continuing within the framework of the Warsaw Convention under a plan the essential features of which are:

First. The limits of international carrier liability for passengers will be increased from $8,300 to $75,000 per person. Those travelers who wish to carry greater protection will be free to take out additional insurance to cover their needs. There will be no limit on liability where the carrier is guilty of wilful misconduct.

Second. Airlines in international travel will be absolutely liable up to $75,000 per passenger regardless of any fault or negligence. Recovery by those who need it most will thus be maximized and expedited. Long and costly lawsuits will be unnecessary in many cases.

Third. International airlines carrying well over 90 percent of Americans in international travel are participating in the plan. The recommendation of the Senate Foreign Relations Committee that no airline operating within the United States remain outside the plan has been substantially complied with. Those United States airlines which initially declined to come within the plan have now indicated their agreement to accepting an increase in liability from $8,300 to $75,000.

Fourth. This is an interim arrangement terminable on twelve months' notice. In the months ahead public hearings will be held for the purpose of determining the definitive United States position in preparation for further international discussions concerning the Warsaw Convention.

Fifth. The international carriers who have notified the Civil Aeronautics Board of their acceptance of the interim arrangements are: Aeronaves, Air Canada, Air France, Air India, Aer Lingus, Alitalia, BEA, BOAC, Canadian Pacific, CMA, El Al, Icelandic, Iberia, Japan Air Lines, KLM, Lufthansa, Olympic, Philippine Airlines, Qantas, Sabena, SAS, Swissair, Varig and VIASA; American, Braniff, Continental, Eastern, Northeast, Northwest, Pan American, Panagra, TWA and Western. The following United States airlines mainly engaged in domestic carriage which have accepted the increased limits of liability but not the feature of absolute liability are: Delta, National and United. It is expected that other carriers will join the plan.

Sixth. Those guilty of sabotage and persons claiming on their behalf will not be entitled to recover any damages.

By acceptance of the plan the United States and all of the other participating countries have assured the continuation of the uniform system of law governing airlines, shippers and passengers and have demonstrated again the viability of the system of international cooperation in civil aviation and in international law.

* * *

EXHIBIT H

DEPARTMENT OF STATE
FOR THE PRESS

May 14, 1966 No. 111

In accordance with the decision announced yesterday, the United States Government today formally withdrew its notification of termination of adherence to the Warsaw Convention for the Unification of Certain Rules Relating to International Transportation by Air. The withdrawal took the form of a note delivered by the United States Embassy in Warsaw to the Polish Ministry of Foreign Affairs at 11:00 A.M. today local time.

The text of the note is as follows:

Excellency,

I have the honor, on instructions from my Government, to give formal notification to the Government of the Polish People's Republic of the withdrawal by the United States of America of the notice of denunciation submitted on November 15, 1965 of the Convention for the Unification of Certain Rules Relating to International Transportation by Air and the Additional Protocol relating thereto signed at Warsaw on October 12, 1929.

At the time the notice under Article 39 was submitted, the United States Government stated that that action was taken solely because of dissatisfaction with the low limits of liability for death or personal injury provided in the Convention, even as those limits would be increased by the Protocol to amend the Convention done at The Hague on September 28, 1955. Since that time, intensive negotiations among carriers and among governments have succeeded in establishing a new interim arrangement in accordance with Article 22(1) of the Convention, whereby participating carriers have agreed, in cases of the death, wounding, or other bodily injury of a passenger, to limits of liability of $75,000 per passenger inclusive of legal fees and costs (or $58,000 exclusive of legal fees and costs in case of a claim brought in a State where provision is made for separate

award of legal fees and costs) and have agreed not to avail themselves in any such cases of any defense under Article 20(1) of the Convention, or the Convention as amended by the Hague Protocol. This arrangement is applicable to all international transportation by the carrier as defined in the Convention or the Convention as amended by the Hague Protocol which according to the contract of carriage includes a point in the United States of America as a point of origin, point of destination, or agreed stopping place.

In view of the acceptance of this arrangement by the great majority of the world's international airlines, including all principal carriers serving the United States, the conditions which led the United States to serve its notice of November 15 have substantially changed. Accordingly, the United States of America believes that its continuing objectives of uniformity of international law and adequate protection for international air travelers will best be assured within the framework of the Warsaw Convention. The United States of America looks forward to participation by all carriers and governments in the provisional arrangement described above and to its acceptance on a worldwide basis. Further, the Government of the United States looks forward to continued discussions looking to an up-to-date and permanent international agreement on the important issues dealt with in the Warsaw Convention.

My Government would appreciate it if the Government of the Polish People's Republic would inform the Government of each of the High Contracting Parties to the Convention of this notification.

* * *

EXHIBIT I

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

Order No. E-23680

Adopted by the Civil Aeronautics Board
at its office in Washington, D.C.
on the 13th day of May, 1966

Docket 17325
Agreement C.A.B. 18900

Agreement Relating to Liability
Limitations of the Warsaw
Convention and the Hague Protocol

ORDER APPROVING AGREEMENT

The Convention for the Unification of Certain Rules Relating to International Transportation by Air, generally known as the Warsaw Convention, creates a uniform body of law with respect to the rights and responsibilities of passengers, shippers, and air carriers in international air transportation. The United States became a party to the Convention in 1934, and eventually over ninety countries likewise became parties to the Convention.[1] On November 15, 1965, the United States Government gave notice of denunciation of the Convention, emphasizing that such action was solely because of the Convention's low limits of liability for personal injury or death to passengers.

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1 The Convention was amended by the Protocol signed at Hague in 1955 which has never been ratified by the United States. The Convention, (subject to certain provisions) limits carriers' liability for death or injury to passengers in international transportation to 125,000 gold francs, or approximately $8,300. The Protocol, subject to certain provisions, provides for liability limitations of approximately $16,600.

Pursuant to Article 39 of the Convention this notice would become effective upon six months' notice, in this case, May 15, 1966. Subsequently, the International Air Transport Association (IATA) made efforts to effect an arrangement among air carriers, foreign air carriers and other carriers (including carriers not members of IATA) providing the major portions of international air carriage to and from the United States to increase the limitations of liability now applicable to claims for personal injury and death under the Convention and the Protocol. The purpose of such action is to provide a basis upon which the United States could withdraw its notice of denunciation.

The arrangement proposed has been embodied in an agreement between various air carriers, foreign air carriers, and other carriers which has been filed with the Board pursuant to section 412(a) of the Federal Aviation Act of 1958 and Part 261 of the Board's Economic Regulations and assigned the above designated C.A.B. number.

By this agreement, the parties thereto bind themselves to include in their tariffs, effective May 16, 1966, a special contract in accordance with Article 22(1) of the Convention or the Protocol providing for a limit of liability for each passenger for death, wounding, or other bodily injury of $75,000 inclusive of legal fees, and, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, a limit of $58,000 exclusive of legal fees and costs. These limitations shall be applicable to international transportation by the carrier as defined in the Convention or Protocol which includes a point in the United States as a point of origin, point of destination, or agreed stopping place. The parties further agree to provide in their tariffs that the Carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of the Convention or the Convention as amended by the Protocol. The tariff provisions would stipulate, however, that nothing therein shall be deemed to affect the rights and liabilities of the Carrier with regard to any claim brought by, on behalf of, or in respect of any person who has willfully caused damage which

results in death, wounding, or other bodily injury of a passenger.

The carriers by the agreement further stipulate that they will, at time of delivery of the tickets, furnish to each passenger governed by the Convention or the Protocol and by the special contract described above, a notice in 10 point type advising international passengers of the limitations of liability established by the Convention or the Protocol, or the higher liability agreed to by the special contracts pursuant to the Convention or Protocol as described above. The agreement is to become effective upon approval by this Board, and any carrier may become a party to it by signing a counterpart thereof and depositing it with the Board. Withdrawal from the agreement may be effected by giving 12 months' written notice to the Board and the other Carrier parties thereto.

As indicated, the decision of the United States Government to serve notice to denounce the Convention was predicated upon the low liability limits therein for personal injury and death. The Government announced, however, that it would be prepared to withdraw the Notice of Denunciation if, prior to its effective date, there is a reasonable prospect for international agreement on limits of liability for international transportation in the area of $100,000 per passenger or on uniform rules without any limit of liability, and if pending such international agreement there is a provisional arrangement among the principal international air carriers providing for liability up to $75,000 per passenger.

Steps have been taken by the signing carriers to have tariffs become effective May 16, 1966, upon approval of this agreement, which will increase by special contract their liability for personal injury or death as described herein. The signatory carriers provide by far the greater portion of international transportation to, from, and within the United States.

The agreement will result in a salutory increase in the protection given to passengers from the increased liability amounts and the waiver of defenses under Article 20(1) of the Convention or Protocol. The United States Government has concluded

that such arrangements warrant withdrawal of the Notice of Denunciation of the Warsaw Convention. Implementation of the agreement will permit continued adherence to the Convention with the benefits to be derived therefrom, but without the imposition of the low liability limits therein contained upon most international travel involving travel to or from the United States. The stipulation that no tariff provision shall be deemed to affect the rights and liabilities of the carrier with regard to any claim brought by, on behalf of, or in respect of any person who has willfully caused damage which results in death, wounding or other bodily injury of a passenger operates to diminish any incentive for sabotage.

Upon consideration of the agreement, and of matters relating thereto of which the Board takes notice, the Board does not find that the agreement is adverse to the public interest or in violation of the Act and it will be approved.

Accordingly, pursuant to the provisions of the Federal Aviation Act of 1958, and particularly sections 102, 204(a), and 412 thereof:

IT IS ORDERED THAT:

1. Agreement C.A.B. 18900 is approved.

This order will be published in the Federal Register.

By the Civil Aeronautics Board:

HAROLD R. SANDERSON
Secretary

(SEAL)

EXHIBIT J

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 70

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Petitioner,

—v.—

JOHN LISI, *et al.*,

Respondents.

REPLY BRIEF OF PETITIONER TO THE MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*

AUSTIN P. MAGNER
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IN THE

Supreme Court of the United States

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JOHN LISI, *et al.*,

Respondents.

REPLY BRIEF OF PETITIONER TO THE MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*

The Solicitor General's Memorandum[1] has failed to inform the Court of the severe impact which the majority decision of the Court below has had upon the international aviation relations of the United States, and of the doubt which this decision has cast upon the reliability of the United States in abiding by the rules established by the Treaty.

I.

To date, AUSTRALIA, BRAZIL, CANADA, ITALY, THE FEDERAL REPUBLIC OF GERMANY, THE NETHERLANDS and THE UNITED KINGDOM, have each officially protested to the Government of the United States that the majority decision of the

1 Filed pursuant to the Court's Order of May 15, 1967, which reads: "The Solicitor General is invited to file a brief expressing the views of the United States."

Court below is contrary to their agreement with the United States as expressed in the Treaty.

All of these nations participated in the drafting of the original Treaty. They know that the imposition of the sanction in Article 3(2) was intended to be limited to cases of non-delivery of the passenger ticket. They know that this intent is clearly expressed in the Treaty. The Government of the United States also knows it. Otherwise, why did the United States urge, in 1955, that the Treaty be amended so as to extend the scope of the sanction to cases of failure to give notice?

II.

The Solicitor General's Memorandum overlooks the views of the United States as expressed by its official representatives at the Hague Conference in 1955 where several amendments to the Warsaw Convention were then being considered. At that time, the United States sought and achieved an amendment to the Treaty to extend the sanction in Article 3(2) to cases where the passenger ticket fails to include notice that the limits of liability may be applicable.[2]

If the majority decision of the Court below is correct, as urged by the Solicitor General, then the United States is made to appear to have sought and obtained a wholly unnecessary amendment to Article 3(2) in 1955.

When the Solicitor General was a member of the Court of Appeals for the Second Circuit, he placed conclusive reliance on the official position of the Government of the United States at the Hague Conference in 1955 in deciding a question involving the proper interpretation of Article 2 of the Warsaw Convention. In *Mertens* v. *The Flying Tiger Line, Inc.*, 341 F. 2d

2 I INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW, ICAO Doc. 7686-LC/140 p. 134 (1955). The Hague Protocol amending the Warsaw Convention in this and other respects has never been ratified by the United States, nor does it appear probable that it ever will be ratified. See, S. EXEC. DOC. H, 86th Cong. 1st Sess. (1959); S. EXEC. REPT. NO. 3, 89th Cong. 1st Sess. (1965); Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 504-516, 532-546 (1967).

851 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965), the argument was advanced by the plaintiff that transportation performed under contract for the Military Air Transport Service of the United States Government fell within the scope of the reservation of the United States under the Additional Protocol with respect to Article 2, and, therefore, was not subject to the Warsaw Convention. In affirming the District Court's rejection of this argument, then Judge Marshall reasoned as follows:

> "The regularity of the chartering relationship between the United States and defendant gives us some cause to look upon this analytic distinction with some circumspection. *But these doubts are dispelled by the negotiations surrounding the adoption of the Hague Protocol of 1955*. See generally, International Conference of Private Air Law, The Hague, September 1955, International Civil Aviation Organization, Doc. 7686-LC/140
>
> "A draft protocol was prepared by the Legal Committee of the International Civil Aviation Organization at Rio de Janeiro in September 1953 and was submitted to the Hague Conference in September 1955. It sought to amend Article 2 of the Convention to read: 'The Convention shall not apply to * * * [c]arriage of persons, cargo and baggage for military authorities by aircraft the whole capacity of which has been reserved by such authorities.' *The natural inference from this effort to amend the Convention is that without such an amendment the Convention would be applicable to such flights, or at least those proposing the amendment thought so. . . . The unavoidable conclusion* is that the Warsaw Convention, as it is presently binding on the United States, is applicable to the flight in this suit." 341 F. 2d 851 at 853-4. (Emphasis added.)

Now, however, the Solicitor General would ignore these negotiations in a virtually identical situation, and thereby avoid an equally "unavoidable conclusion," involving the proper interpretation of Article 3(2) of the Convention.

III.

The Solicitor General's Memorandum contends that this case is of "little prospective importance" in view of the 1966 agreement among a number of airlines (including Petitioner) to a new limit of liability of $75,000, and the form of notice of the applicability of this new limit now required by the Civil Aeronautics Board. This same argument was advanced by Respondents in their brief, and was dealt with in detail in Petitioner's reply brief at pages 3-5.

This contention is lacking in merit in view of the following factors:

1. The United States is still a party to the Warsaw Convention.

2. The basic question involved is whether the sanction in Article 3(2) applies in the event of failure to give notice of the applicability of the limit of liability established by the Treaty.

3. This question will repeatedly arise in the future, regardless of the amount of the limitation which may be in force, and regardless of the form of notice which may be required by the Civil Aeronautics Board.

4. The question of whether the sanction of absolute unlimited liability in Article 3(2) is to be applied for failure to give notice will recur constantly in subsequent cases where no notice has in fact been given, or where some Court concludes, as did a majority of the Court below, that the CAB approved form of notice is inadequate for one reason or another. Significantly, the CAB approved form of notice now in use is not required to be printed on the ticket, but may be set forth on a separate paper. 14 C.F.R. § 221.175. A fact question as to whether a passenger actually received this slip of paper is bound to arise in many, if not most, future cases because of the holding of the majority decision of the Court below. A carrier, confronted with the contention by a passenger that he did not receive the slip of paper, will certainly include in its defense a contention that the Treaty does not require notice in any event, and that no sanction applies under the Treaty for the failure to give notice of the limita-

tion of liability. Thus, the identical questions presented by the Petition herein are certain to arise again and again in aviation accident litigation is this country.

5. There are more than 100 cases pending today in the courts of the United States involving the Warsaw Convention and passenger tickets and baggage checks identical in form to those involved herein. Final resolution of these cases will be directly affected by the ultimate decision in this case.

6. The same form of passenger ticket and baggage check as involved herein is still in daily use throughout the world by all members of IATA and ATA.

IV.

This is not a "small print" case, as the Solicitor General's Memorandum assumes. The Petition presents basic questions involving proper interpretation of the Treaty, and as such they are important questions of federal law which have not been, but should be settled by this Court.

The Solicitor General's Memorandum ignores the legislative history of the drafting of Article 3(2). This history demonstrates unequivocally the intent of the drafters to limit the imposition of the sanction in Article 3(2) to cases of non-delivery of the passenger ticket. An early draft of Article 3(2), which would have extended the imposition of the sanction to cases of failure to include the notice in the passenger ticket, was expressly considered, and after debate, rejected by the parties. See, II[ème] CONFÉRENCE INTERNATIONALE DE DROIT PRIVÉ AÉRIEN, ICAO Doc. 7838, pp. 100-101, 129, 168 (1930); Petition, pp. 10-12.

This clear intent of the parties to the Treaty is evident from a comparison of Article 3(2) with Articles 4(4) and 9. The Solicitor General's Memorandum treats lightly of the significant distinction between these related articles, and purports to distinguish *Grey* v. *American Airlines, Inc.*, 95 F. Supp. 756 (S.D.N.Y. 1950), *aff'd*, 227 F. 2d 282 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956) on this point. In a "carefully prepared

opinion" adopted by the Court of Appeals, District Judge Noonan analyzed the distinction between Articles 3(2) and 4(4) and 9, and concluded that the parties clearly intended that the imposition of the sanction in Article 3(2) be limited solely to cases of non-delivery of the passenger ticket. Judge Noonan stated:

> "Article 3(2) merely requires that the ticket be delivered to the passenger and thus clearly differs from Articles 4(4) and 9. *I must conclude that this omission or difference is most significant.* For I cannot agree with plaintiffs' argument that Article 3(2) intends that the ticket delivered contain the items set forth in Article 3(1), when those who drafted the treaty were so explicit in this regard in Articles 4(4) and 9." 95 F. Supp. 756 at 758. (Emphasis added.)

CONCLUSION

The substantial error of the majority decision of the Court below, and the necessity for review by this Court, are best expressed in the words of Judge Moore:

> "The majority do not approve of the terms of the treaty and, therefore, by judicial fiat they rewrite it. They think a 'one-sided advantage' is being taken of the passenger which must be offset by a judicial requirement that the passenger have notice of the limitation of liability.
>
> * * * * *
>
> Judicial predilection for their own views as to limitation of liability should not prevail over the limitations fixed by the legislative and executive branches of Government even though this result is obtained by ostensibly adding to the treaty a requirement of actual understanding notice." (R. 74a-75a; Appendix B, pp. 24-25).

Notwithstanding the view advanced by the Solicitor General's Memorandum, the questions presented herein should be decided finally by this Court.

Respectfully submitted,

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July 18, 1967

EXHIBIT K

No. 70

In the Supreme Court of the United States

OCTOBER TERM, 1967

ALITALIA-LINEE AEREE ITALIANE, S.P.A., PETITIONER

v.

JOHN LISI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE CIVIL AERONAUTICS BOARD AS AMICUS CURIAE

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE CIVIL AERONAUTICS BOARD AS AMICUS CURIAE

In June 1967, at the invitation of the Court, the government filed a memorandum suggesting that the decision below was correct.[1] That memorandum also pointed out that the Civil Aeronautics Board had not purported to pass upon, much less to decide, the size of type face or other typographical details which the airlines should employ in printing the warning re-[2]quired with respect to limited liability under the Warsaw Convention. In light of the fact that the briefs of petitioner and others urging reversal, filed since the Court granted the petition, contain various statements as to the meaning and effect of the Board's past actions and its authority over the subject matter of the notice requirement, we submit this memorandum to clarify the Board's role in this area.

1 In a memorandum filed on December 22, 1967, in response to an invitation from the Court in *Berguido* v. *Eastern Airlines, Inc.*, No. 528, this Term, the government reiterated its position that a ticket purporting to warn of limited liability under the Warsaw Convention does not of itself comply with Article 3 of the Convention if printed in type too small to attract reasonable notice.

The air carriers have at no time presented for Board approval any agreement relating to the size of type to be utilized in relation to any matter appearing on a ticket, either generally or in relation to the Warsaw Convention. Prior to the accident here involved, the Board, pursuant to the provisions of Section 412 of the Federal Aviation Act, 49 U.S.C. 1382, had regularly approved agreements containing the language in which the warning regarding limited liability was couched, and also had accepted for filing various tariff rules containing such language. As far as the Board was concerned, however, the carriers were at liberty to utilize any type they chose, and otherwise to determine the typographical manner in which the warning was given. Furthermore, the Board had not at any time expressed any views on the size of type necessary to give adequate notice to the public. It was not until 1964 that the Board imposed a requirement for minimum type size and for use of contrasting ink and stock with respect to such warning. Even then, that requirement was imposed primarily under the tariff filing provisions of Section 403, of the Act, 49 U.S.C. 1373, and did not purport to represent any Board determination that the Warsaw Convention requires [3]either larger or smaller type. While the views of the Board as the agency charged with regulating air transportation under the Federal Aviation Act might be persuasive with respect to what constitutes adequate notice under the Warsaw Convention, the Board has not taken the position that the adjudication of this matter is within its primary expertise, nor has it acted on such a premise. The Board recognizes no reason why the question of what the Warsaw Convention requires may not be decided judicially as an independent matter.

I

An understanding of the nature and effect of the Board's actions will be facilitated by a brief description of the statutory provisions involved. Section 412 of the Federal Aviation Act requires that air carriers file with the Board copies of their agreements with other carriers which affect air transportation, and directs the Board to disapprove any such agreement which it finds to be adverse to the public interest or in violation of the

Federal Aviation Act. If the Board does not make such findings, the statute directs the Board to approve the agreement. A consequence of approval is to relieve the carriers involved from the restraints imposed by the antitrust laws and related statutes.[2]

The Board asserts the authority to impose, as a condition of its approval of a particular agreement, qualifications which it deems necessary to safeguard the overall public interest. In this way the Board [4]on occasion may require action which it could not otherwise demand. Since, however, hundreds of agreements are filed each year, the Board is not in a position to explore exhaustively the legality of particular agreements under other laws (including treaties), or to focus upon every conceivable circumstance in which the public interest might be served through the attachment of conditions.

Additionally, Section 403 of the Act requires that carriers file their tariffs with the Board. Under familiar principles, provisions for exculpation from liability may be included therein and, in appropriate circumstances, have the force of law. (The Board ordinarily accepts for filing those tariffs which conform to its rules, and the mere acceptance of a tariff constitutes no determination as to the lawfulness of any provision contained therein.) Furthermore, the implementation of an agreement between carriers on the subject of rates or liability may depend on the filing with the Board of tariffs embodying the agreed-upon rate or exculpatory provision.

Finally, Section 204 of the Act, 49 U.S.C. 1324, vests in the Board the broad investigative and rule-making authority necessary to the discharge of its duties.[3]

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2 Section 414, 49 U.S.C. 1384.

3 Section 204(a) provides (49 U.S.C. 1324(a)):

> The Board is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedures, pursuant to and consistent with the provisions of this Act, as it shall deem necessary to carry out the provisions of, and to exercise and perform its powers and duties under, this Act.

[5] II

In 1949, the Board had before it the initial IATA Traffic Conference resolutions establishing a uniform passenger ticket, baggage check, and air waybill, as well as IATA's proposed conditions on liability for injury to passengers, baggage and cargo in international transportation. Included in the liability provisions was a proposed warning to be placed in the carriers' tickets to give notice of the Warsaw Convention.[4] The carriers represented, and the Board agreed, that the adoption of uniform ticketing and interline arrangements between carriers would produce significant benefits to the traveling public, and on the basis of these considerations the Board approved the use of a uniform ticket, *IATA Traffic Conference Resolutions*, 10 C.A.B. 783.[5] There was, however, no request that the Board approve any particular size for the ticket or the type, and indeed it appears that not even a specimen ticket was pre-[6]sented for the Board's consideration.[6] On the contrary, the resolution in terms provided "(3) that the questions of language and size be left to each member." The Board's opinion contains no reference to the proposed language relating to the Warsaw Convention, and in dealing with other proposed exculpatory conditions the Board made plain that it was not attempting to pass upon the requirements of the Convention. Rather, the Board pointed out (10 C.A.B. at p. 787) that the carriers had "represented

4 The proposal provided: "(4) that the Conditions of Contract on the inside cover of the Passenger Ticket and Baggage Check read as follows:

"*Conditions of Contract*

• • • • •

"(2)(a) Carriage hereunder is subject to the rules relating to liability established by the Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw, October 12, 1929 (hereinafter called "the Convention") unless such carriage is not 'international carriage' as defined by the Convention. (See Carrier's tariffs for such definition.)"

5 See pp. 2 and 3 of the Joint Brief of ATA and IATA in this Court, pointing out the advantages of a uniform ticket.

6 The entire agreement filed with the Board, including the warning provision, was typed in 10 point size type.

* * * that these resolutions are not in abridgement of" the Convention, but rather that their purpose was "to place the same ceiling on liability in non-Warsaw air transportation as is provided under the Warsaw Convention * * *." Although the Board found (*id.* at p. 788) that this proposal was "a step away from the public policy of this country" with respect to carrier liability, it accepted most of the details of the conditions of carriage, including the provision relating to notice (footnote 4, *supra*), subject to further study on the part of the carriers and action by the Board. In addition, the "notice" provisions were later included in various tariffs filed with the Board, but there was no Board tariff rule then in force specifying the size of type to be utilized in the warning notice.

In 1954, the IATA carriers submitted additional resolutions relating to the uniform ticket and the limitation of liability for international passengers. One such resolution contained the warning language in substantially the same form as the 1949 resolution. [7]After the over-all resolution had been initially disapproved on various grounds, see Order E-8543, 24 C.A.B. 580, informal conferences were held and the Board approved as not adverse to the public interest an amended resolution containing a notice and various other exculpatory provisions. *Pan American World Airways, et al., Conditions of Carriage*, 24 C.A.B. 575.[7] As pointed out by the Joint Brief of ATA and IATA before this Court, the Board stated that the revised notice provision had been improved. However, the Board again was explicit in declaring that its action did not constitute determination of compliance with the Warsaw Convention.[8] Further-

7 Again, the agreement filed with the Board, including the Warsaw Convention notice, was typed throughout in 10 point size type.

8 In the one area in which a Warsaw compliance problem was discussed, the Board clearly distinguished between the "public interest" standard of the Federal Aviation Act and the provisions of the Convention, 24 C.A.B. at p. 577:

[T]he Board's approval merely finds as not adverse to the public interest an agreement between the carriers to insert in their conditions of

more, the carriers did not request Board approval of any ticket form as such, or of any proposal with respect to the size of type to be utilized therein.[9]

[8] III

In 1963, prompted by a new agreement relating to the Warsaw Convention and in order to reexamine the 1957 IATA resolution, the Board issued a notice of proposed rule-making pursuant to its powers under Sections 204(a), 401(e), and 403 (the tariff filing provisions),[10] and 411 (unfair competitive practices)[11] to the effect that the "type in which the notice is currently printed on the ticket is too small to alert the passengers to the importance of the matter." 28 F.R. 3281, 3282. Subsequently, in 1964, the Board specified that the carriers must give notice "in type at least as large as 10 point modern type and in ink contrasting with the stock" (14 C.F.R. 221.175). This requirement undoubtedly constituted the Board's view as to the size of type likely to provide a passenger with effective notice of a limitation on carrier liability. Again, however, in promulgat-

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contract a provision that the agreed stopping places for the purpose of the Convention shall be the scheduled stopping place on the passenger's route shown in the timetables, and is in no sense a determination by the Board that such provision meets the requirement of the Convention that the agreed stopping places be contained in the ticket.

9 We believe it is misleading for ATA and IATA in their Joint Brief to assert that at the time of approval the Board had before it a specimen ticket disclosing the size of type to be employed and to create thereby the inference that the Board approved such size. A specimen ticket was attached to a resolution dealing with the types of information to be inserted in various portions of a uniform ticket, but there was no submission of the ticket with reference to the notice of limitation of liability. Furthermore, as noted in the text, there was no request for approval of any particular size of ticket or size of type with respect to the Warsaw Convention notice. Neither, it may be added, did the tariffs filed in implementation of the approved resolution contain any such specification, nor did the Board's tariff filing regulations then require any minimum size type in relation to the notice.

10 49 U.S.C. 1324(a), 1371(e), 1373.

11 49 U.S.C. 1381.

ing this rule, the Board did not profess to be codifying or in any way determining what size type may be required by the Warsaw Convention.

[9] IV

In sum, the Board has never been repesented with any carrier agreement purporting to fix the size of type or other typographical details of the Warsaw Convention notice. Nor has the Board claimed primary jurisdiction to pass upon those questions. When the Board did focus on the adequacy of the notice of limited liability in 1963 and found that a minimum size type should be prescribed, the Board was not endeavoring to determine the requirements of the Warsaw Convention; rather, it imposed the requirement for minimum size type to effectuate the statutory public-interest test. While it is true, as the ATA suggests, that the Board had equal power to impose such a requirement prior to the accident here involved, the fact remains that the Board did not do so. Accordingly, the Board does not consider its actions as material to the disposition of this case, save to the extent that its 1964 requirement may be viewed as an expression of its view that lesser size type did not suffice to give adequate notice appropriate in the public interest.

Respectfully submitted.

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FEBRUARY 1968.

EXHIBIT L

No. 70

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 70

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Petitioner,

v.

JOHN LISI, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF CANADA FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* and BRIEF OF CANADA *AMICUS CURIAE*

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December 20, 1967.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF CANADA FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

Canada respectfully moves for leave to file the attached brief as *amicus curiae* in support of the petitioner.

Counsel for the petitioner has consented to the filing of this brief, but counsel for the respondents has refused consent.

Canada is a contracting party to the Warsaw Convention* and to the Hague Protocol**. As a contracting party **[2]** with the United States to the Convention. Canada has a direct and continuing interest in securing the uniform implementation of the Warsaw Convention in a manner consistent with the intentions of the contracting parties. The decisions below of the United States Court of Appeals for the Second Circuit and the United States District Court for the Southern District of New York ignore the intentions of the contracting parties, change by judicial fiat a clear and express provision of the Convention embodying the mutual commitments of the contracting governments and are contrary to the uniform construction placed upon this provision by all the contracting parties, including the United States.

Canada has also cooperated with the United States to assure the effectiveness of the special agreement (the so-called "Interim Agreement") developed in Montreal in May 1966 among various air carriers providing for the increase in the limitations of liability applicable under the Convention and Protocol with respect to air carriage to and from the United States.*** In consequence of the decisions below, the future operation of the Interim Agreement and its salutary results are in jeopardy.

Canadian air travelers and air carriers, publicly and privately owned, have a profound interest in retaining the benefits for international air travel achieved by the Warsaw Convention in

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* Convention for the Unification of Certain Rules Relating to International Transportation by Air, Concluded at Warsaw, October 12, 1929, 49 Stat. 3000; T. S. 876; Canadian *Carriage by Air Act*, 1939, c. 12, s. 1. See Canada's Notice of Accession to the Convention dated June 10, 1947, the text of which is annexed as Appendix A.

** Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Transportation by Air, September 28, 1955. Printed in Civil Aeronautics Board, Aeronautical Statutes and Related Material 324-66 (1963); Candian *Carriage by Air Act*, as amended, 12 Eliz. II. Chap. 33 (1963). See Canada's Instrument of Ratification of the Protocol dated March 20, 1964, the text of which is annexed as Appendix B.

*** 31 Fed. Reg. 7302 (1966). See Note delivered by the Canadian Embassy in Washington, D.C. to the State Department dated May 12, 1966, the text of which is annexed as Appendix C.

promoting uniformity in ticketing and in regulating air carrier liability. The decisions below threaten to destroy this uniformity.

Canada seeks leave to intervene as *amicus curiae* to voice its objections to the interpretations placed upon the Warsaw Convention by the Courts below and to apprise **[3]** this Court of the serious implications for the future in allowing the decisions below to stand.

For the foregoing reasons, it is respectfully requested that this motion for leave to file a brief as *amicus curiae* be granted.

Dated: December 20, 1967.

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[5] IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 70

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Petitioner,

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JOHN LISI, *et al.*,

Respondents.

BRIEF OF CANADA AS *AMICUS CURIAE*

Statement

It is the position of Canada, as a signatory to the Warsaw Convention, that the decision below of the majority of the Court of Appeals does not give effect to the intentions of the contracting parties and that, if permitted to stand, would effect a unilateral and substantive amendment in the Convention. Such a judicially imposed amendment could effectively frustrate the recent steps taken to liberalize the Convention's provisions.

Canada submits that

(1) Article 3 of the Convention does not impose a requirement as a condition for limitation of liability that a prospective passenger receive notice [6] that the transportation is subject to the rules relating to liability established by the Convention.

(2) it was the intention of the contracting parties under Article 3(2) of the Convention that if an air carrier delivers

a ticket to a prospective passenger the limitations of liability under the Convention are applicable,[1] and

(3) the delivery of the tickets in the instant cases fulfilled the requirement under Article 3(2) of the Convention.

Canada further submits that the Interim Agreement[2] developed in Montreal in May 1966 under Article 22(1) of the Warsaw Convention (pursuant to which international air carriers stopping in the United States accept liability without regard to fault up to a limit of $75,000) is bottomed upon continued adherence by the contracting parties to the Convention and to its continued implementation in accordance with the intentions of the contracting parties. The interpretation of the Convention in the decisions below, if left standing, taken in conjunction with the carrier's obligations under the Interim Agreement, could result in absolute and unlimited liability being imposed upon the air carrier without regard to fault.

[7] Argument

The Courts below, in their consideration of the airline's ticket involved in this case and in relating it to Article 3 of the Warsaw Convention, expressed two fundamental misconceptions about the Convention: one with respect to the significance of the delivery of the ticket as required by Article 3(2) and the

1. Article 3(2) provides:

"The absence, irregularity or loss of the passenger ticket does not affect the existence of the validity of the contract of carriage which shall none the less be subject to the rules of this Convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this Convention which exclude or limit his liability." 49 Stat. 3000, 3015.

2. The Interim Agreement is filed with the Civil Aeronautics Board as C.A.B. Agreement No. 18,900 (Order Series No. E-23680). See 31 Fed. Reg. 7302 (1966). A copy of the text of the Interim Agreement is annexed as Appendix D.

other with respect to the purpose of the enumeration in Article 3(1) of information for inclusion in the ticket.[3]

Under the plan of the Convention, the delivery by the carrier of the passenger's ticket is the act which invokes the full operation of the Convention. As learned commentators have pointed out: "All determinations regarding applicability of the Convention are based on the ticket." Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 500 (1967). These commentators further note: ". . . once the ticket has been issued, it makes no difference to applicability which airline performs the carriage . . ." *id.* at 501. Thus, it is the act of delivering the ticket that is made of controlling significance under Article 3(2).

The notion advanced by the Courts below that the requirement of delivery should be construed as establishing a further and unwritten requirement that the passenger be afforded a "reasonable opportunity" to take steps to protect himself against limitation of liability was adopted from two earlier Court of Appeals cases, *Mertens* v. *Flying Tiger Line, Inc.*, 341 F. 2d 851 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965) and *Warren v. Flying Tiger Line, Inc.*, 352 F. 2d 494 (9th Cir. 1965).

[8] However, in both the *Mertens* and *Warren* cases the Courts were presented with situations where there had in fact been no delivery of a ticket prior to the commencement of the carriers' responsibility for the passengers as laid down in Article 17 of the Convention. Thus the express requirement of Article 3(2) that there be delivery of a ticket had not been complied with before the air travel commenced. The further and indefinite requirement of affording the passenger a "reasonable opportunity" to take some other action, which the Courts in *Mertens* and *Warren* suggested be read into the Convention, was unnecessary to their decisions. The reiteration and expansion of this requirement by the Courts below in the instant cases

3. The Solicitor General in his argument opposing the petition for a writ of certiorari similarly failed to grasp these aspects of the Convention when he asserted that a literal reading of Article 3(1) would "deprive" that provision of "purpose and meaning." Memorandum for the United States as *Amicus Curiae*, p. 7.

result in an addition to the Convention which was specifically rejected by the contracting parties.[4]

The further misconception implicit in the decisions below is the notion that Article 3(1), and particularly Article 3(1)(e), has a purpose other than to prescribe a descriptive outline of what the passenger ticket shall include. The declared purpose of the Warsaw Convention was to regulate for international air travel "in a uniform manner"

> —"the documents used for such transportation" and
> —"the liability of the carrier".
> 49 Stat. 3000, 3014.

Article 3(1) is not concerned with sanctions, but with describing what, in the interests of uniformity, a passenger ticket for international air travel should contain.

The success of the Convention in this regard is evidenced by the form of ticket involved in the instant cases which was the standard form in general use by substantially all international air carriers, including Canadian air carriers. It was approved by the Civil Aeronautics Board (24 C.A.B. 575 (1957)) pursuant to its powers under the Federal Aviation Act of 1958, 72 Stat. 770, 49 U.S.C. § 1382.

[9] Disregarding the fundamental concepts of the Convention relating to the delivery and the description of the ticket, the Courts below in their decisions wrote into the Warsaw Convention their own domestic concept of adequate notice as a condition precedent to the application of the limitation on liability provided for in the Convention. Any such change in the Convention is a subject for multi-lateral negotiation among the contracting parties, not for judicial fiat.[5]

4. A proper construction of the Convention is found, we submit, in Grey v. American Airlines, Inc., 95 F. Supp. 756 (S.D.N.Y. 1950), *aff'd*, 227 F. 2d 282 (2d Cir. 1955), *cert. denied*, 350 U. S. 989 (1956).

5. Such an amendment to Article 3(2) of the Convention should not be confused with unilateral steps properly taken by contracting parties within their own jurisdictions to regulate the manner in which carriers bring to the attention of passengers the applicability of the Convention's limitations on liability. The C.A.B. on behalf of the United States has properly taken such

The Courts effected this amendment by lifting one of the descriptive provisions in Article 3(1) to the status of a condition which must be met under Article 3(2) in order for the air carrier to avail itself of the provision in the Convention relating to limitation of liability. There is no basis in the Convention for singling out Article 3(1)(e) as was done by the Courts below. If such decisions are permitted to stand, there can be no logical reason for excluding the other subparagraphs of Article 3(1) as conditions which also would have to be met by the air carrier in order for it to avail itself of the provisions relating to limitation of liability.

Moreover, this judicially imposed requirement creates uncertainty for the air traveler as to his rights and as to the availability of the limitation of liability defense to the air carrier and invites unending litigation and a proliferation of interpretations, including inconsistencies among the various jurisdictions, as to what constitutes adequate **[10]** notice.[6] Such judicial rewriting of the Convention is incompatible with the principles laid down by this Court with respect to the effect and interpretation of treaties.

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unilateral action in regulating the carriers' activities within the United States. 14 C.F.R. § 221.175 (1967). But, it is one thing for the United States to require carriers to take certain action within the United States; it is quite a different matter for the United States, either by its responsible administrative agency or by its courts, unilaterally to impose as a sanction for failure to comply with these regulations the removing of the Convention's limit of liability.

6. One need not look beyond the decisions of the Courts below for an example of the problems created by the strained interpretation of Article 3(2). The District Court determined that the language on the ticket in question in this case would have constituted adequate notice had it been readable (253 F. Supp. 237, 243 n. 7). On the other hand, despite the fact that the Civil Aeronautics Board had approved the very form of passenger ticket involved in these cases, 24 C.A.B. 575, the Court of Appeals stated that it was highly questionable whether the language contained on the ticket would have constituted adequate notice even if readable (370 F. 2d 508, 514 n. 10). The differing opinions on the question of adequate notice, both as to substance and form, are limited only by the number of courts willing to entertain this question in the applicable jurisdictions of the various contracting parties.

As a treaty made under the authority of the United States the Warsaw Convention is a part of the "supreme Law of the Land". U.S. Const. art. VI, § 2. It may not be vitiated or amended in its implementation by reading into it requirements of local domestic law relating to notice and providing for sanctions for failure to comply with such local requirements. The plain language of Article 3(2) permits limitation of liability in all instances except where no ticket is delivered by the carrier.

Deviation from the purport of language and clear intention of the contracting parties to a treaty is not permissible. *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 71 (1821); *Maximov* v. *United States*, 373 U.S. 49, 54 (1963).

Moreover, in ascertaining the meaning of a treaty it is appropriate to look to the negotiations of the contracting parties and to their own practical construction of the treaty. *Factor* v. *Laubenheimer*, 290 U.S. 276, 294-95 (1933); see also *Block* v. *Campagnie Nationale Air France*, Docket No. 21609, CA 5, Nov. 8, 1967 (Slipsheet, pp. 28-31).

[11] The history of the negotiations in the period 1925 to 1929, treated in the petitioner's brief, shows that the contracting parties expressly rejected the language which the Courts below read into the Convention. Moreover, the proceedings at The Hague in 1955, similarly treated in petitioner's brief, confirm that the practical construction given the Convention by the United States as well as other contracting parties was contrary to the interpretation of the Courts below.

The recent judicially imposed requirement of notice under Article 3(2) of the Convention is particularly untenable when viewed with the 1966 Interim Agreement among various international air carriers (see Appendix D), which was prompted by the action taken by the United States to withdraw from the Convention.

On November 15, 1965, the United States gave notice of its denunciation of the Warsaw Convention. On the same day it issued a press release stating it would be prepared to withdraw the notice of denunciation if there were a reasonable prospect of an international agreement on limits of liability in the area of $100,000 per passenger and suggesting that, pending such international agreement, an arrangement among principal interna-

tional airlines could be arranged waiving the limits of liability up to $75,000 per passenger. 53 Dep't State Bull. 923 (1965). The effective date of the denunciation, as provided in Article 39 of the Convention, was to be May 15, 1966.

Immediately prior to the effective date, Canadian and American air carriers, as well as other air carriers, entered into the Interim Agreement, the recognized purpose of which was to provide a basis upon which the United States would withdraw its notice of denunciation of the Convention. 31 Fed. Reg. 7302 (1966).

[12] The Interim Agreement embodies two significant provisions:

> 1. It increased the limit of liability from approximately $8,300 to $75,000 per person on transportation to, from or with an agreed stop in the United States;[7] and
>
> 2. It provided for waiver by the air carriers of Article 20(1), which would otherwise enable the air carrier to avoid liability if it proved that it took necessary steps to avoid the damage or proved that it was impossible to take such measures.

Thus, the Interim Agreement resulted in the imposition of absolute liability of up to $75,000 upon the signatory carriers for all provable damages assuming the passenger did not cause or contribute to the damages. In addition, the Agreement set forth an exact form of notice as well as the type point to be used on or attached to the ticket, ticket envelope, or a piece of paper placed in the ticket envelope or attached to the ticket.

On May 11, 1966 the Canadian Air Transport Board telegraphed the Civil Aeronautics Board that on the assumption the United States was withdrawing denunciation of the Warsaw Convention the Air Transport Board would accept filings incorporating the provisions of the Interim Agreement. In a subsequent Note to the State Department, the Canadian Embassy informed the United States that the text of this telegram reflected the views of **[13]** the Canadian Government in this mat-

7. $58,000 of jurisdictions where provision is made for separate award of cost of litigation.

ter. See Appendix C. On May 16, 1966, the United States announced its decision to withdraw its notice of denunciation.[8] On the same day, the Civil Aeronautics Board approved the Interim Agreement by Order, stating:

> "The U.S. Government has concluded that such arrangements [*i.e.*, the Interim Agreement] warrant withdrawal of the Notice of Denunciation of the Warsaw Convention. *Implementation of the agreement will permit continued adherence to the Convention with the benefits to be derived therefrom*, but without the imposition of the low liability limits therein contained upon most international travel involving travel to or from the United States." 31 Fed. Reg. 7302 (1966). (Emphasis supplied.)

The Canadian Government in its diplomatic note at the time expressed the hope that the Interim Agreement would be replaced by appropriate amendment to the Warsaw Convention and the Hague Protocol through diplomatic conference as soon as possible. See Appendix C.

If the decision below, and the reasoning upon which it is based, is not reversed, the signatories to the Interim Agreement, having waived any defenses they otherwise might have had under Article 20(1) of the Convention, would find themselves faced with uncertainty as to their limitation of liability, which would be dependent upon a showing that "adequate notice" of the Convention was contained on the ticket. The result would be absolute **[14]** but limited liability (up to $75,000) by reason of the Interim Agreement, but potential absolute and unlimited liability were the notice deemed by any court to be "inadequate". Thus, the Courts below, by their arbitrary construction of Article 3 have added an abiding uncertainty regarding the application of the Convention and thereby have jeopardized the recent steps taken, as reflected in the Interim Agreement, to liberalize the Convention provisions.

8. Dep't of State Press Releases Nos. 110 and 111, May 13 and 14, 1966; 54 Dep't State Bull. 955-57 (1966).

CONCLUSION

The decision and judgments below should be reversed.

Dated: December 20, 1967.

Respectfully submitted,

ROBERT MACCRATE,
Counsel for Canada,
48 Wall Street,
New York, N.Y. 10005.

ROBERT D. KRUMME,
SULLIVAN & CROMWELL,
New York, N.Y.
Of Counsel.

724 (previously 275b)

PASSENGER TICKET—CONDITIONS OF CONTRACT

PSC1(01)724 Expiry: Indefinite
PSC2(01)724
PSC3(01)724 Type: A

RESOLVED that,

(1) the 'Notice' and the 'Conditions of Contract' on the Passenger Ticket and Baggage Check used for interline international carriage read as shown in Paragraph (2) below:

(a) the text of the Notice shall be printed in bold letters, eight point size, preferably in Helvetica or similar large character letters and the text of the Conditions of Contract, in six point size of the same character:

(b) Paragraph 2 of the text of the Conditions of Contract shall be printed in bolder type than the other paragraphs thereof.

(2) the titles and text of the Notice and Conditions of Contract are:

NOTICE

If the passenger's journey involves an ultimate destination or stop in a country other than the country of departure the Warsaw Convention may be applicable and the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage. See also notice headed 'Advice to International Passengers on Limitation of Liability'.

CONDITIONS OF CONTRACT

1. As used in this contract 'ticket' means this passenger ticket and baggage check, of which these conditions and the notices form part, 'carriage' is equivalent to 'transportation', 'carrier' means all air carriers that carry or undertake to

carry the passenger or his baggage hereunder or perform any other service incidental to such air carriage. 'WARSAW CONVENTION' means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw, 12th October 1929, or that Convention as amended at The Hague, 28th September 1955, whichever may be applicable.

2. Carriage hereunder is subject to the rules and limitations relating to liability established by the Warsaw Convention unless such carriage is not international carriage as defined by that Convention.

3. To the extent not in conflict with the foregoing carriage and other services performed by each carrier are subject to:

   (i) provisions contained in this ticket,

   (ii) applicable tariffs,

   (iii) carrier's conditions of carriage and related regulations which are made part hereof (and are available on application at the offices of carrier), except in transportation between a place in the United States or Canada and any place outside thereof to which tariffs in force in those countries apply.

4. Carrier's name may be abbreviated in the ticket, the full name and its abbreviation being set forth in carrier's tariffs conditions of carriage, regulations or timetables; carrier's address shall be the airport of departure shown opposite the first abbreviation of carrier's name in the ticket; the agreed stopping places are those places set forth in this ticket or as shown in carrier's timetables as scheduled stopping places on the passenger's route, carriage to be performed hereunder by several successive carriers is regarded as a single operation.

5. An air carrier issuing a ticket for carriage over the lines of another air carrier does so only as its Agent.

6. Any exclusion or limitation of liability of carrier shall apply to and be for the benefit of agents, servants and representatives of carrier and any person whose aircraft is used by carrier for carriage and its agents, servants and representatives.

7. Checked baggage will be delivered to bearer of the baggage check. In case of damage to baggage moving in international transportation complaint must be made in writing to carrier forthwith after discovery of damage and, at the latest, within seven days from receipt; in case of delay, complaint must be made within 21 days from date the baggage was delivered. See tariffs or conditions of carriage regarding non-international transportation.

8. This ticket is good for carriage for one year from date of issue, except as otherwise provided in this ticket, in carrier's tariffs, conditions of carriage, or related regulations. The fare for carriage hereunder is subject to change prior to commencement of carriage. Carrier may refuse transportation if the applicable fare has not been paid.

9. Carrier undertakes to use its best efforts to carry the passenger and baggage with reasonable dispatch. Times shown in timetables or elsewhere are not guaranteed and form no part of this contract. Carrier may without notice substitute alternate carriers or aircraft, and may alter or omit stopping places shown on the ticket in case of necessity. Schedules are subject to change without notice. Carrier assumes no responsibility for making connections.

10. Passenger shall comply with Government travel requirements, present exit, entry and other required documents and arrive at airport by time fixed by carrier or, if no time is fixed, early enough to complete departure procedures.

11. No agent, servant or representative of carrier has authority to alter, modify or waive any provision of this contract.

EXHIBIT M

724 (previously 275b)

PASSENGER TICKET—CONDITIONS OF CONTRACT

PSC1(01)724
PSC2(01)724
PSC3(01)724

Expiry: Indefinite

Type: A

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(2) the titles and text of the Notice and Conditions of Contract are:

NOTICE

If the passenger's journey involves an ultimate destination or stop in a country other than the country of departure the Warsaw Convention may be applicable and the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage. See also notice headed 'Advice to International Passengers on Limitation of Liability'.

CONDITIONS OF CONTRACT

1. As used in this contract 'ticket' means this passenger ticket and baggage check, of which these conditions and the notices form part, 'carriage' is equivalent to 'transportation',

'carrier' means all air carriers that carry or undertake to carry the passenger or his baggage hereunder or perform any other service incidental to such air carriage. 'WARSAW CONVENTION' means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw, 12th October 1929, or that Convention as amended at The Hague, 28th September 1955, whichever may be applicable.

2. Carriage hereunder is subject to the rules and limitations relating to liability established by the Warsaw Convention unless such carriage is not 'international carriage' as defined by that Convention.

3. To the extent not in conflict with the foregoing carriage and other services performed by each carrier are subject to:

(i) provisions contained in this ticket.

(ii) applicable tariffs.

(iii) carrier's conditions of carriage and related regulations which are made part hereof (and are available on application at the offices of carrier), except in transportation between a place in the United States or Canada and any place outside thereof to which tariffs in force in those countries apply.

4. Carrier's name may be abbreviated in the ticket, the full name and its abbreviation being set forth in carrier's tariffs conditions of carriage, regulations or timetables; carrier's address shall be the airport of departure shown opposite the first abbreviation of carrier's name in the ticket; the agreed stopping places are those places set forth in this ticket or as shown in carrier's timetables as scheduled stopping places on the passenger's route; carriage to be performed hereunder by several successive carriers is regarded as a single operation.

5. An air carrier issuing a ticket for carriage over the lines of another carrier does so only as its Agent.

6. Any exclusion or limitation of liability of carrier shall apply to and be for the benefit of agents, servants and representatives of carrier and any person whose aircraft is used by carrier for carriage and its agents, servants and representatives.

7. Checked baggage will be delivered to bearer of the baggage check. In case of damage to baggage moving in international transportation complaint must be made in writing to carrier forthwith after discovery of damage and, at the latest, within seven days from receipt; in case of delay, complaint must be made within 21 days from date the baggage was delivered. See tariffs or conditions of carriage regarding non-international transportation.

8. This ticket is good for carriage for one year from date of issue, except as otherwise provided in this ticket, in carrier's tariffs, conditions of carriage, or related regulations. The fare for carriage hereunder is subject to change prior to commencement of carriage. Carrier may refuse transportation if the applicable fare has not been paid.

9. Carrier undertakes to use its best efforts to carry the passenger and baggage with reasonable dispatch. Times shown in timetables or elsewhere are not guaranteed and form no part of this contract. Carrier may without notice substitute alternate carriers or aircraft, and may alter or omit stopping places shown on the ticket in case of necessity. Schedules are subject to change without notice. Carrier assumes no responsibility for making connections.

10. Passenger shall comply with Government travel requirements, present exit, entry and other required documents and arrive at airport by time fixed by carrier or, if no time is fixed, early enough to complete departure procedures.

11. No agent, servant or representative of carrier has authority to alter, modify or waive any provision of this contract.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL DOCKET NO. 565
MISC. NO. 83-0345
WASHINGTON, D.C.
FEBRUARY 28, 1985

IN RE: KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1983

The above-entitled matter came on for hearing on motions of plaintiffs for partial summary judgment, before the Honorable Aubrey E. Robinson, Jr., Chief Judge, at 10 o'clock.

APPEARANCES:

DONALD W. MADOLE, ESQ.
JUANITA M. MADOLE, ESQ.
MILTON G. SINCOFF, ESQ.
GEORGE E. FARRELL, ESQ.
STEVEN POUNIAN, ESQ.
JAMES M. KENNY, ESQ.
FOR THE PLAINTIFFS

JAN K. VON FLATERN, ESQ.
THOMAS J. MCLAUGHLIN, ESQ.
MARY ROSE HUGHES, ESQ.
JAMES B. MCQUILLAN, ESQ.
GEORGE N. TOMPKINS, JR., ESQ.
FOR THE DEFENDANTS

DAWN T. COPELAND
OFFICIAL COURT REPORTER

[2] PROCEEDINGS

THE DEPUTY CLERK: In Re: Korean Air Lines.

Counsel, as you come to the podium, please state your name for the record.

THE COURT: Good morning.

Would you like to proceed?

MR. SINCOFF: The motion, your Honor?

THE COURT: Yes.

MR. SINCOFF: May it please this Honorable Court, my name is Milton Sincoff. I am co-chairman of the plaintiffs committee with Mr. Madole who will speak to other items on the agenda. And it is my privilege to present the position of the plaintiffs committee on the motion for summary judgment. Perhaps more precisely we could call it two motions wrapped up into one and the motion, of course, is against Korean Air Lines only and it is for summary judgment and it turns on the rather unique status of law that is peculiar to international aviation and somewhat alien to the more traditional principles that I suppose we are all accustomed to dealing with.

I don't believe there is any dispute among the plaintiffs and Korean Air Lines with regard to the applicable law.

I think it is clear that, and I don't believe there is any dispute that the Warsaw Treaty applies to all [3] the cases subject to these two motions.

The Montreal Agreement that was signed by Korean Air Lines is also applicable to these two motions.

I also don't believe that there is any dispute about the fact that the foreign air carrier permit issued to Korean Air Lines as well as federal regulations are also applicable.

Negligence, the traditional motions involving airlines, is not relevant to the motions at hand, although from reading some of the papers from our adversary, there seems to be some emphasis upon culpability. I don't feel it appropriate to comment on

that, comment on culpability, because as a legal matter, it is not relevant to the motions for summary judgment.

The reason for it very simply is that under the Warsaw Convention—Treaty and the Montreal Agreement, which are clearly applicable, fault is not an issue and that treaty and that agreement, which were created for the benefit and with the participation of airlines, and at the expense of innocent victims and passengers of airplane disasters, simply makes fault irrelevant and that regime creates no fault liability in exchange for a damage limitation on condition that the airline can take advantage of the damage limitation and must provide a specific clear warning to the passengers.

[4] That was a system that was started to be created in 1929. The United States became a party to the treaty in 1934 and I will comment later about the developments since that time.

Now, if I can just address what I think is the simpler of the two issues before the Court, and certainly in terms of the weight of these papers, it is the simpler of the two issues and that deals with the part of the motion in which all of the plaintiffs that are parties to this application, all 52, I believe, is the number, who have moved through the plaintiffs committee for the relief, and they seek simply to have paid immediately to them a sum of $75,000.

The reason for that application is the terms of the treaty and agreement state that applicable to the circumstances here, when a passenger is killed on this kind of an international flight, the airline is liable without any evidence of fault. Fault is irrelevant and the airline is liable up to $75,000.

All 52 plaintiffs who have moved have submitted affidavits to demonstrate their damages exceed the limit and some of the papers involve affidavits by people with direct knowledge such as widows and other family members. Some of the affidavits are presented by counsel, but it is certainly clear that the damages sustained exceed the [5] limit and we think that it is only fair and appropriate that rather than having Korean Air Lines have the benefit of $4 million which would be involved by simply multiplying the number of plaintiffs times $75,000, we think that that money should be paid, $75,000 to each family. They

after all, are the victims of this catastrophe and to alleviate in part the financial hardship, a prompt payment should be made.

Now, Korean Air Lines takes issue with the evidentiary showing by some of the plaintiffs and we submit that if there is any doubt about the evidentiary showing, and we don't think there is, but if there, then the alternative exists for this Court to direct Korean Air Lines to pay $75,000 for each of the deceased passengers into court so that that fund can be accruing interest for the ultimate benefit of the plaintiffs who are covered.

If I can invite the Court's attention to one or two affidavits that illustrate my point that there has been a proper showing, I would invite the Court to two sample affidavits attached to the motion from the plaintiffs committee dated February 17 and there is a pile of exhibits entitled "Exhibits Accompanying Plaintiffs' Motion for Partial Summary Judgment."

Within that body, there is—there are the affidavits for each individual family.

[6] If your Honor would like me to, I would just take one or two to illustrate my point.

There is one by—there is a one-page affidavit of five paragraphs by, for example, the widow of one of the passengers.

I am referring now to the widow Bevins. She says, she is the plaintiff. She is also the administratrix appointed to represent her husband's estate and her husband was a passenger and that in the motion papers, they conceded he was a passenger, and at the time he was 32 years old and earning approximately $31,000 a year. They had two children and all were dependent upon the decedent for support.

I think that clearly illustrates the damages recoverable will substantially exceed the damage limit.

There are other affidavits as well. I don't know if it is necessary for me to take the time of the Court unless the Court desires me to do so, but very simply put then, if there is any doubt about a particular plaintiff's showing, procedural doubt, the alternative is to pay the money into the court for investment in an interest bearing appropriate form or to create a fund which would be invested and administered by someone else other than the clerk of the Court.

And in many of the cases, I believe there is no doubt and the money should be paid immediately and directly **[7]** to each of the families of victims.

Now, turning to the other part of the motion that involves the bulk of the papers and citations and legal issues, I would like to refer first to the history of the treaty because I think it is directly relevant to the determination.

First, there are some things that are not in dispute. The first thing is that in the 23 cases, as I count them, which is about 40 percent of the total number of passengers who are making the overall application, 23 of the passengers received tickets which did not meet the standards required and there is no doubt because the affidavits submitted by Korean Air Lines concedes that these tickets were printed in eight point type.

I specifically refer to the affidavit of Abraham Meilen. He was the printing expert obtained by Korean Air Lines and on page 2 of his affidavit, he concedes that the ticket booklets for the 23 passengers were printed in eight point type.

The papers the plaintiffs committee submitted included two affidavits from printing experts who said it was eight point or less and I don't wish to quibble. Eight point is sufficient for purposes of the motion.

Now, the motion that is brought by the 23 families of these passengers seeks a declaration by this Court that **[8]** Korean Air Lines is liable.

There's no dispute that it is liable, but it is liable not by any—it is liable for actual compensatory damages sustained in each case without any damage limit. So we seek, therefore, for these 23 families, entry of a liability judgment leaving the only issue for trial, the compensatory damages for each family without damage limit.

The basis of the motion is founded upon two cases, the Lufthansa case in this Circuit and the Second Circuit case involving the Polish Air Lines crash in Warsaw. By coincidence, the Warsaw Treaty is also involved.

Now, in the late 1920's, governments in other countries convened a convention which was designed for the purpose of protecting the government air lines, an industry then in its infancy,

from the economic consequences for damages in the event of an airplane catastrophe.

The American Government was an observer at that international convention and as a result of it, there was born the Warsaw Treaty.

At that time, the Warsaw Treaty provided for imposing liability, shifting the burden of proof to the airlines, declaring it would be liable unless it could prove it was not culpable to any extent and the treaty also provided for damage limitation which was the equivalent at the time of $8,300 in American currency. **[9]** About five years later the United States adhered to that treaty, and that was in 1934.

As the years passed, the intensity increased with the satisfaction of the damage limitation and it became clear that the infant industry did not require the protection which was asserted as necessary in the late 1920's because ample insurance was available at reasonable costs and the net result of the treaty was to impose the economic burden on the families of victims as well as passengers who survived these airplane catastrophes.

As a result, the United States in 1965, because of its dissatisfaction with the limitation, denounced the treaty, withdrew the treaty and pursuant to the terms of the treaty, any government that withdrew was required to give six months' notice of the withdrawal before the withdrawal became effective.

Our government did indeed do that and the effective date was in 1966. And virtually on the eve of the effective date of our withdrawal of the treaty, the airlines who had previously resisted most strenuously an increase in the damage limitation finally relented and agreed to a formal Montreal contract which was approved by our Federal government. The essence of which was that the airlines would become absolutely liable without any defense of exculpation for no fault in exchange for, and that damage limit would **[10]** then become $75,000 per passenger on the condition that the airline provided each passenger with a warning about the damage limitation.

Our government was concerned about the warning and went so far as to specify the precise wording of the warning so that it would give notice to the passengers, in the government's view, and they also specified that to prevent any small print escaping

notice, the government regulation mandated the size of the print to be at least ten point type and the airline could, of course, print it even larger and there was a serious dispute as to whether even ten point type was adequate to give a lay passenger notice.

Nonetheless, the regulation had become effective in 1973 and in 1966 the government withdrew its denunciation and this Montreal Agreement/Warsaw Convention regime continued as it does through the present date as far as the United States is concerned.

Now, Korean Air Lines to take an economic advantage of the fertile United States traveling market applied to our government for permission to fly its planes to and from the United States.

Absent permission by our government, Korean Air Lines could not fly to our country.

The permit was issued to Korean Air Lines on **[11]** condition that it comply and one of the conditions precedent to that permit was that it comply with a number of requirements, one of which was that it provide tickets with this minimum of ten point type warning to passengers.

THE COURT: What did the Montreal Agreement provide with respect to any airline that failed to comply with the ten point type?

MR. SINCOFF: The Montreal Agreement did not specify the consequences. It simply stated—

THE COURT: So an airline, like the defendant Korean Air Lines, had a choice. If they did not want to fly in the United States, and to comply with this requirement, they did not apply for this authority to do so.

MR. SINCOFF: Precisely, your Honor.

THE COURT: But there was no other sanction provided in the Montreal Agreement.

MR. SINCOFF: Your Honor is correct.

THE COURT: Either with respect to the size of the print or the content of the notice.

MR. SINCOFF: The Montreal Agreement did require the notice. It did require the minimum—

THE COURT: If they chose not to give the notice, they could not fly in the United States. Is that correct?

MR. SINCOFF: That is correct, your Honor. They could not do so lawfully.

[12] Now, in 1973, ten years before this catastrophe, an attack was made by the airlines in the name of Lufthansa against this very regulation and the case is cited at page 8 of our brief and this Circuit rejected the attack and specifically declared that if they wished to take advantage of the limitation, they had to provide the notice.

That was Lufthansa against the Civil Aeronautics Board.

It was an attack on the regulation. It did not arise out of an airplane crash but it is clear from the holding that the Court specifically discussed that the regulation required that the ten point type notice and failure to comply with the notice would preclude taking advantage of the damage limitation.

Now, so from 1973 on, Korean Air Lines was on notice as to what the consequences were to be in the event that it did not comply with, number one, its signature to the Montreal Agreement, number two, to the conditions precedent of its air carrier permit.

Then came the Polish Air Line case and about 18 months before the Korean catastrophe, a Federal district court in New York declared that the failure of Polish Air Lines to abide by its foreign air carrier permit, its agreement of the Montreal Contract, the consequence was it could not take advantage of the limit and therefore the plaintiffs **[13]** were entitled to judgment on liability there being no damage limitation.

The sole distinction between the Polish Air Lines case, which was affirmed by the Circuit, the Second Circuit, cert. denied by the Supreme Court, the sole distinction between that case and this case is that the Polish tickets involved were printed in eight point five type, slightly larger than the conceded eight point type here.

The Court held that if you did not comply with the minimum ten point requirement, the consequence was that you could not take advantage of the damage limitation.

That was the square holding of the District Court and the square holding of the Circuit Court.

THE COURT: And that was the damage limitation in the Warsaw Convention. Is that correct?

MR. SINCOFF: Yes, $75,000 limitation.

THE COURT: And they related it to what provision of the Warsaw Convention?

MR. SINCOFF: They declared that Warsaw required the delivery of a ticket specifying the terms and conditions. There is no dispute that Warsaw has that provision.

Warsaw also has—the treaty, that is, itself has a provision that if you fail to deliver a ticket specifying the conditions of contract, that that failure constitutes a denial of the damage limitation.

[14] Indeed, another case cited by our brief is Lisi v. Alitalia. There the ticket that was delivered, as the Court called it, lilliputian-sized printed and the Court construed the Warsaw Treaty to say that you had to give notice in the delivery of the ticket that was reasonable and use of lilliputian size print, in that case, precluded the airline from taking advantage of the damage limitation.

So even before the Polish Air Lines case came along, it was clear that the size of the print was not a matter of inconsequence, as my friends in court would have it.

THE COURT: So the effect of that then is that each country can decide for itself how to interpret the provisions of Article 3 of the Convention?

MR. SINCOFF: No. I think what the Second Circuit held in the Lisi v. Alitalia case, that opinion was affirmed by an equally divided Supreme Court of the United States, but what it held was that in the United States where there is litigation and the plaintiff sues the airline properly in the United States, in our country, we are going to insist that in order for the airline to take advantage of the limitation it provide the required proper notice.

Now, the Polish Air Lines case reasoned, we think, your Honor, quite properly that having obtained the foreign air carrier permits with the condition precedent, having signed the Montreal Agreement, and having benefitted from **[15]** the—having benefitted financially from operating into this country, where suit is properly brought here, our American Courts are

going to require strict compliance with the minimum ten point type and that our Courts are not going to become involved in, well, it is nine point—is nine point five ok, eight point five ok, eight point ok.

Our Court in the Second Circuit held squarely that the regulation and the rule and the understanding was clear. It was unequivocable, a minimum of ten point type and when you didn't comply with that requirement which was very easy to do, all you had to do was make sure your print was the proper size, but if you did not comply, however less than ten point it may be, the airline was liable without limit.

Now, they say that it is unjust. We beg to differ. We think that the entire Montreal Agreement/Warsaw Treaty is unjust to the passengers, but if we have to live with that, as we do, then our rights are bound by that treaty and agreement, unfairly we, as passengers, say, then the airline has to live by its quid pro quo, its obligation for it to obtain the privilege of the limitation, and it is required and it is obligated to comply with what was well known and recognized as a simple minimal requirement, to print your tickets in sufficient size as you agreed to do and as the law requires.

[16] THE COURT: The only difficulty I have is that I find it extremely difficult to understand how airlines by agreement can amend a treaty.

MR. SINCOFF: It is a question that has been faced and—

THE COURT: That I do not understand. There isn't any question about the fact that we have Warsaw and Hague and they relate on a treaty.

You are here by virtue of the treaty jurisdiction in this Court and I find it extremely difficult to understand how you can possibly say that the Montreal Agreement between carriers under the threat of our denunciation of the Warsaw, and I cannot understand how that can be construed as an amendment of Article 3, (1) or (2) of the Warsaw Convention which is the only thing that controls us in this litigation.

MR. SINCOFF: Well, I must respectfully say, your Honor, that what I will present to you is the view expressed by the Courts, the rationale expressed by the Courts—

THE COURT: Well, they just slide over it.

They make assumptions that I find it very difficult to understand.

Then you come back and you talk about the function of the Court is to interpret the treaty and not to amend it.

MR. SINCOFF: Well, we didn't amend the treaty. **[17]** The airlines—

THE COURT: No, but I think the Second Circuit amended it.

MR. SINCOFF: The treaty was amended by the airlines with the approval of the Federal Government. It was supplemented by—

THE COURT: We are talking about treaties now. I'm not talking about any agreements.

The Montreal Agreement is not a treaty.

MR. SINCOFF: Conceded.

THE COURT: The Montreal Agreement never amended either the Hague or Warsaw.

MR. SINCOFF: Well, as to the Hague, that is not relevant as far as our—

THE COURT: It certainly did not amend Warsaw, did it?

The only thing that Warsaw said you could do is that if you failed to deliver a ticket, then Article 3, section (2), then the airlines subject themselves to unlimited liability.

MR. SINCOFF: Warsaw has another provision that says that the treaty can be changed by special contract and a special contract—

THE COURT: But as I pointed out to you, and I asked you a moment ago, where was the special contract? **[18]** What provision in the special contract at Montreal provided for the sanction against an airline that failed to comply?

MR. SINCOFF: And my answer to you then, and it still is, your Honor, that the Montreal Agreement has a special contract pursuant to the terms of the Warsaw Treaty which approves special contracts.

The Montreal Agreement specifically provided for the requirement of a notice printed in at least ten point type.

THE COURT: I understand that.

MR. SINCOFF: It did not specify the consequence of failure.

THE COURT: That is the point I am making.

MR. SINCOFF: Yes, your Honor.

THE COURT: The lack of that, which you grant to be very technical, if it is nine point nine nine, nine point five, then you get a question of de minimis. If it is 11 or 12 or as you said, as big as the walls of this courthouse, then everything is fine, but I find it very difficult how you can slide into a preclusion of limitation on liability from a failure to provide the ten point type.

MR. SINCOFF: The way I—

THE COURT: You know, it might take some people a fifteen point type to have meaningful notice. What you are actually saying is is that if they want meaningful notice, **[19]** then the airline is required to give everybody an eyetest to find out what they can read and to find out what they cannot read.

If you want a meaningful notice, then there should be provided a provision that before you can get on a plane, that you have to have a period of time in which you have the ticket explained to you because your rights are being severely jeopardized and like before we lock somebody up, we have to tell them about their rights so you know exactly what you are getting into.

It seems to me to be stretching it a fur piece, as they would say, but I do know that two Courts have stretched it that far and one, the Second Circuit.

MR. SINCOFF: Your Honor, if I might borrow your Honor's term about sliding into the sanction, the consequence of no limit, I would say that Lisi v. Alitalia did precisely that.

It is precisely in point to that issue.

Lisi involved a small warning printed on the ticket and it said, we are not going to allow an airline, a foreign airline, to use print of the size which is too small and when it delivers a ticket, and it indeed did deliver a ticket, and there is no dispute about that, but when it delivers a ticket with the warning which is not printed in adequate size, the Court said that the treaty provides for the consequence **[20]** of no damage limitation because, giving the warning in inadequate size print is the equivalent of delivering no ticket.

Physically a ticket was delivered and that's the way the Lisi Court construed the treaty.

Now, your Honor could debate and I think that there was—

THE COURT: What other construction is there anywhere else in the world that conforms to that? That is just the point I make.

If the purpose of a treaty is to have uniform application, then that construction leaves it up to every country to decide for itself whether or not there was a delivery of a ticket and the delivery of a ticket is a factual issue.

Pure and simple, Article 3 says that if you don't deliver a ticket and not if you deliver a ticket of an improper size, but if you don't deliver a ticket, that is the only reference as to this business, and if you don't do that, airlines, then you have given it up.

MR. SINCOFF: Well, I think, your Honor has brought me precisely to the point where I would say that because of your concern for uniformity, it is precisely for that reason that courts in the United States should construe this Warsaw Treaty in a uniform way.

You have the benefit of the Lisi case, the Lufthansa **[21]** case which said what the consequences would be and most importantly, you have the benefit of the Second Circuit in the Polish case giving you a framework of uniformity for you, I think, and I respectfully request that you accept the rationale.

The rationale for these three cases that the limitations basically and fundamentally are unfair but if you want the benefit of—

THE COURT: We are over and beyond that. We are over and beyond the fairness or the unfairness of the limitations. That was decided when we withdrew our denunciation of the treaty back in 1966.

MR. SINCOFF: Absolutely agreed, your Honor.

So the quid pro quo, the exchange, for the limit is the notice and that is the exchange. You get the benefit of the limit with the notice.

THE COURT: You can't point to a single discussion in any of the minutes of the Montreal Agreement that say that.

MR. SINCOFF: Well, your Honor—

THE COURT: Here we have got the best minds in air aviation in the country sitting around. We have all kinds of discussions. There was tremendous concern about this in the whole industry.

And nowhere in that discussion was there ever any suggestion that this was a quid pro quo **[22]** and I find that difficult to understand.

MR. SINCOFF: The language of the treaty precisely states, without any equivocation, that the failure to deliver a ticket had the consequences of denying the airline the limitation.

THE COURT: There is no question about that and that has never been changed to this moment.

MR. SINCOFF: We would also suggest to your Honor that 11 of the 23 cases which have moved for this relief of a declaration of liability without limit were commenced originally in the Eastern and Southern Districts of New York and Korean Air Lines asked that those cases be sent here. They have been.

THE COURT: I know that I am bound by the Second Circuit. 1407 says that but the rest of it I am not so sure that I am bound by.

I don't think that Lufthansa binds this Circuit.

MR. SINCOFF: Well, in Lufthansa, the Court specifically said that if you don't follow the requirements of the notice, you are going to be precluded from taking advantage of the limit. That is what the District of Columbia Circuit said and so I think that is very good guidance for your Honor to follow.

With regard to the cases that were not filed in New York, we think that the Polish Air Lines case makes **[23]** good sense because our Government was led to withdraw from its denunciation, to cancel the denunciation, and to continue as a party because of the commitments made by the air lines in the agreement.

That agreement was not just a piece of paper. It was formally approved by the Federal Government. It had the authority of law.

THE COURT: All I am saying is that even in the notice of withdrawal of the denunciation, our Government never said that we are satisfied now that Article 3, section (2) has in fact been amended to the point that we can hold the airlines on unlimited liability if they don't comply with the agreement that they entered into in Montreal. There is nothing like this in the whole discussion and that is what I find to be rather disconcerting.

MR. SINCOFF: What I would say to your Honor is this quite, quite fervently, that if you were to isolate the issue in that way without giving cognizance to the history, I could understand it but I think to ignore the history—

THE COURT: I am not ignoring the history. They fought out this business of the limitation of liability very clearly and that is why they spelled out what they spelled out. That is just the point I am trying to make.

MR. SINCOFF: Well, the Lisi case—

THE COURT: The history of this whole business **[24]** since Warsaw through Hague, through Montreal, indicates that having hammered out this question of limited liability with absolute fault, that is what they come out with, and if there had been anything that toyed with that, it would have been specified with great precision by them and that is the thing that disturbs me about the Montreal Agreement and the interpretation of the Second Circuit.

MR. SINCOFF: I would say this, to follow that line of reason, would mean that it would be free for the airlines to come in and say we are not liable without fault because the agreement doesn't—can't modify the treaty and the treaty gives us the opportunity to avoid all liability by coming into court and proving that we are not at fault.

So I would say that that would certainly be a position which would be untenable because in fact the agreement did change the rights, duties and obligation of the airline with regard to the treaty.

That Montreal Agreement cannot be—that agreement cannot be isolated from the treaty. It is part of the treaty because it imposes on the airline with its consent, with the airline's agreement, it imposes on the airline consequences.

The consequences can't be denied simply because the treaty stands alone unmodified.

THE COURT: The consequence of not complying with the treaty is that they can't fly. They can't be certified **[25]** to fly in this country.

The CAB says we will not authorize you to fly.

MR. SINCOFF: Well, what we say is that when Korean Air Lines gets that authority, as it did in 19- —

THE COURT: Whenever, they got it.

MR. SINCOFF: Well, a decade or more before this catastrophe, and when it got that permission, and when it signed the agreement, which it had done at the time it obligated itself to provide the notice because at that time and for the decade that followed, it was on notice by reason of Lisi and this Circuit's decision, that if it didn't comply with the minimum ten point notice, then the consequence would be no limitation and what is wrong with that?

If we, as the plaintiff, could prove culpability of Korean Air Lines, negligence, under ordinary principles, it would be liable for full damages and if our friends across the aisle desire to put us to the standard of proving negligence on the part of Korean Air Lines in exchange for recovering full compensatory damages, we would have no problem with that, your Honor, but what they wish to do is take half of the loaf without paying the price for the other half.

They want the damage limitation but they are not prepared to give the required applicable notice.

We say that if you forcefully assert the treaty, as they do, you pay the consequences when you fail to abide **[26]** by the conditions precedent that allowed you to conduct this very flight, and that is our position and I believe it is a sound one.

I would hope that the Court, feeling obligated as it does to follow the Second Circuit as to the New York cases, would recognize that for the sake of uniformity, cases filed in the District of Columbia, Michigan, throughout this country, should be accorded uniform treatment.

Thank you, your Honor.

MR. TOMPKINS: May it please the Court, my name is George Tompkins and I represent Korean Air Lines.

With due respect to the Second Circuit and to this Court's comments, I submit that this Court is not bound by the decisions of the Second Circuit on this issue.

This motion involves the question of Federal law involving a treaty of the United States and only the Supreme Court of the United States can render decisions that would be binding on any other Federal Court including this one.

The Second Circuit doesn't make that law and even the Second Circuit can't make its own mind up on what the law is. As we pointed out in our brief, during the development of the Lisi and Polish Air Lines decisions in the Second Circuit in the midst of that, another panel of the Second Circuit commented in the Stratis case which we have mentioned in our brief that only non-delivery of a ticket **[27]** under Article 3 results in the imposition of the sanction of absolute and unlimited liability.

THE COURT: What we have is constructive non-delivery. That is what the Second Circuit said.

MR. TOMPKINS: That is what has emanated from the Lisi case and I would point out that even the Second Circuit doesn't abide by its prior decisions in dealing with Warsaw Convention issues.

In the 1950's the Second Circuit held that the Warsaw Convention did not create a cause of action for wrongful death.

Some 20 or 30 years later, the Second Circuit, by the same author of the 1950 opinion, changed its mind and the author of the opinion said he was wrong in the 1950's and on rereading the treaty he concluded that it does create a cause of action for wrongful death and in those 30 years other courts in this country have followed the Second Circuit and now that the Second Circuit has changed its mind, some courts have said, well, we may follow and others have said we will and others have said we won't.

So even the Second Circuit isn't sure about its position on what the treaty means and I think that this Court is perfectly correct when it says that the courts have glided over the issue of what the treaty really means and that is the basic issue here. **[28]** I would submit, your Honor, that bad law remains bad law only as successor courts follow it without further examination of the underlying—

THE COURT: Of course, if it was that wrong, I find it difficult that they couldn't have gotten four votes on the petition for cert. because I think it is a major pronouncement as to the liability of the industry.

MR. TOMPKINS: The Supreme Court in the Lisi case, your Honor, granted certiorari in the case and heard oral argument. There were only eight justices who could sit on the case because

Mr. Justice Marshall had filed a brief on behalf of the United States in that case as the Solicitor General.

At the time of that argument, Mr. Justice Fortas asked was there any other country in the world party to the Warsaw Convention that had addressed the issue and I responded that no other court had yet addressed the issue and his response was, well, then we are free to interpret it as we see fit without running afoul of any interpretation in other countries that are a party to the treaty and the answer, of course, was yes.

Now there was a four/four split which results in an affirmance of the lower court but not a precedent from the Supreme Court and if you look at it that way, at least four of the judges on the Supreme Court agreed with our position.

[29] THE COURT: And it was two to one in the Circuit.

MR. TOMPKINS: That is correct, and I think that the position of the Second Circuit, it was two to one on the panel on the Lisi case and six to three on a petition for rehearing en banc and I think that the theme of the case and the entire development of that rule of law of the Second Circuit in the Lisi case is found in Judge Moore's dissent.

The Second Circuit doesn't like the limitation of liability and they made it clear for many years and in the Lisi case they rewrote the treaty to suit their dislike of the limitation and I submit that what Judge Moore said in 1963-64, whenever the decision was handed down, was correct and remained the theme in the Second Circuit today until perhaps some day in the future, as I continued to try to persuade new panels, they may change their minds.

I submit that in our brief we have set forth all of the arguments that should cause this court on re-examination to reject the Lisi case and before 1929 it was proposed that Article 3 of the Warsaw Convention contain a sanction of absolute and unlimited liability, not just for the failure to deliver the ticket, but for the failure to contain the statement as to the applicability of the Warsaw Convention. It is not a notice. It has never been a notice and even the Montreal Agreement isn't a notice. It says advice.

The Warsaw Convention says statement.

[30] In 1955, however, the United States wanted a notice and the 1955 Amendment to the Warsaw Convention, known as the Hague Protocol, contains a provision that would require a notice.

The Supreme Court of Canada—

THE COURT: What is the sanction provided if the notice wasn't—

MR. TOMPKINS: If the notice—if the ticket delivered did not contain the notice, then the sanction was the same as if no ticket was delivered in the Hague Protocol.

THE COURT: That was spelled out.

MR. TOMPKINS: It was spelled out but not in the type size. It was spelled out as a statement.

THE COURT: That is what I am talking about. That is what concerns me about this construction of the Second Circuit.

With all of you lawyers sitting around at these conferences, you and your predecessors, it seems to me that an issue as important as this, you see, as to when you extend the principal issues of the conference and nothing was said about this. This is just mind-boggling.

MR. TOMPKINS: Prior to 1929 in the Convention leading up to adoption of the Warsaw Convention and the conferences, it was thought that the sanction for the failure to contain the statement was too harsh. That has never **[31]** changed in the eyes of the people who draw these agreements up.

As you pointed out, your Honor, and as we pointed out in our brief, the position of the Lisi case is illogical.

A blind person with twenty point type is bound by the limitation of liability but a person, a Rhode's Scholar, with a Ph.D., and with 10/20 vision, gets a notice or advice or statement in less than ten point type isn't bound by the limitation of liability. The position is illogical.

When the Lisi case was before the Supreme Court of the United States there was not a decision in another party country to the Warsaw Convention on the issue but since then there has been, in Canada, which is our closest neighbor dealing with the Warsaw Convention cases and I notice it will be a close neighbor to this courthouse this year, but the Ludecke case decided that in a Warsaw Convention case, only non-delivery of a ticket

results in the sanction of absolute and unlimited liability and if that ticket does not contain a ten point type statement, a twenty point type, a five point type or no statement, the limitation still applies because the treaty says the sanction applies only for non-delivery.

However, the same Supreme Court of Canada said, with the Hague Protocol case, the result is different because the Hague Protocol amended that article of the Warsaw Convention to provide that if the delivered ticket does not contain **[32]** the statement then the sanction does apply and there was the difference.

The United States has never adopted the Hague Protocol because the limitation is too low. It is not the law of this country as to cases in this country involving transportation to and from this country. Now, the court pointed out the importance of uniformity.

Mr. Sincoff points out that it should be uniformity throughout the United States but that is not the law when you are dealing with a multilateral treaty. The objective is uniformity world-wide and here is the Supreme Court of Canada rejecting the Lisi case as contrary to the intent of the party to the Warsaw Convention.

Nine governments at the time of the Lisi case when it was before the Supreme Court advised the Supreme Court through briefs and through diplomatic notes that the Second Circuit decision was contrary to their understanding of their obligations under the Convention with the United States.

I submit that the Lisi case should be rejected as bad law and I submit that some day it will be.

I would like now, if your Honor, to address the first part of Mr. Sincoff's remarks on the partial summary judgment motion, but I want to be certain that I am absolutely certain that the plaintiffs no longer argue that the Warsaw Convention does not apply to all of these cases and I want **[33]** to know if I am correct because I have a lot of briefs that argue that Korea is not a party to the Convention and therefore Korean Air Lines should not be entitled to any of its provisions.

You have changed your position.

MR. SINCOFF: Would you like me to respond to that?

MR. TOMPKINS: Well, you said that it is not disputed that the Warsaw Convention applies to all cases.

MR. SINCOFF: George, my position and the Plaintiffs Committee's position is and always has been that the Warsaw Treaty alone doesn't determine this case. It is the Warsaw Treaty in combination with the Montreal Agreement, the foreign air carrier permit and the federal regulation, and all of those things determine the issue.

What you desire to do is isolate it to the Treaty and we disagree with the isolation.

MR. TOMPKINS: I am no clearer now than I was before.

THE COURT: Yes, I know the point that was made. I know the shift in position.

MR. TOMPKINS: The foreign air carrier permit is quite clear and it required Korean Air Lines to file a counter-part to the Montreal Agreement and, of course, that has been done and that is the limit of the requirement in the foreign air carrier permit.

[34] I submit that the foreign air carrier permit has really nothing to do with the issue before the court.

Addressing myself to the motion for partial summary judgment of $75,000, I respect Mr. Sincoff's opinion on the value of the cases as he believes it to be sometimes. I argue with him sometimes but many times we compromise our positions. But of the proof submitted in support of the evaluation in the cases by the plaintiffs moving for partial summary judgment, 28 are lawyers' affidavits.

Simply stated—

THE COURT: I don't think we need belabor that. I don't think there is any justification for it. It sounds good but I have no intention of doing that.

MR. TOMPKINS: I will merely point out, your Honor, that the Supreme Court presently has before it for decision and the case has been argued, the question of whether prejudgment interest is recoverable in a Warsaw Convention case and the issue about ordering us to deposit moneys so it can draw interest, I suggest that should not be addressed until the Supreme Court has acted.

If the Court feels that the length of this case through a trial with respect to the question of damages and possible appeals is a particular problem, I would suggest you consider adopting a procedure which we suggested to Judge Hatter in the Central District of California in another **[35]** Korean Air Lines accident whereby the questions of damages were tried first, non-jury, so that the judgments were entered and interest could run on those judgment from the day of entry of the judgment pending the ultimate resolution of liability.

He adopted that procedure and we have had non-jury damage trials. We have not had a liability trial yet to determine whether the plaintiffs are entitled to any money or more than the limitation of liability but it was a procedure that—

THE COURT: I do not think that we are at that juncture yet.

MR. TOMPKINS: Very good.

THE COURT: I don't think we are there yet. We will worry about that and all of those trials won't be here anyhow.

MR. TOMPKINS: Very good, your Honor.

THE COURT: I don't know that the Multidistrict Panel will put it on this Court. They will be farmed out to wherever they came from and you will have to approach each Court and settle it on the procedure when we get beyond the liability phase of it.

I want to move the liability aspect because I think some of the things that I do you will want to appeal.

MR. TOMPKINS: I will rest my remarks on our brief, your Honor.

Thank you.

[36] THE COURT: I think the question that was asked, Mr. Sincoff, insofar as Korea is concerned, I think the law is clear that the Republic of Korea is in a treaty relationship with the United States through the Warsaw Convention and the Hague Protocol.

He was asking you whether you take the position that it is or is not.

MR. SINCOFF: Well, my position is that with regard to these particular two motions, your Honor need not determine that question.

I can tell you that there is a plan—the reason I say that it is not necessary is, number one, Hague is not relevant to this motion because the United States is not a party to it.

As to Warsaw, we concede that the Warsaw Treaty applies to these cases, and there's no doubt about that.

What we say is that we don't request nor do we think your Honor should decide the issue about treaty relationship at this point in time because as to other cases that are filed in this Court which are not parties to the motion, that issue is going to be the subject, I believe, of some—

THE COURT: Well, we have several things mixed up because unless the republic of Korea is in a treaty relationship vis-a-vis the United States, we have the problem **[37]** of what are the cases doing here? What is the jurisdiction of this Court?

MR. SINCOFF: And my answer is—

THE COURT: I would assume that with respect to the New York plaintiffs that it is clear that the people who bought tickets in New York from a Korean Air Line officer, over those parties, we have treaty jurisdiction.

MR. SINCOFF: Yes, your Honor.

THE COURT: Now, we have that treaty jurisdiction why?

MR. SINCOFF: By reason of Warsaw alone and the same is true of all 52 cases no matter where they are filed because what we consciously did, your Honor, with regard to these 52 cases, is that we selected only those cases which were clearly governed by Warsaw independent of any other treaty.

The reason—the relationship—

THE COURT: What are the provisions of Warsaw alone without regard to Hague that give this court treaty jurisdiction.

MR. SINCOFF: I believe it is clear and I don't believe there is a dispute about it and that is as to all 52 of these passengers, the literal terms of the Warsaw Treaty apply because, for example, the ticket was purchased in the District of **[38]** Columbia for a flight from the District of Columbia to New York to Korea and back to the United States and even if we were not in a treaty relationship with Korea, that round-trip ticket is governed by Warsaw, so what we say as to these 52 cases is that your Honor need not decide and therefore we urge you not to because it will be the subject of other cases.

These 52 cases are clearly governed by Warsaw and we concede that. There is no issue about it.

If there is no treaty relationship with—

THE COURT: You say you are bound by Warsaw and Warsaw alone. Is that what you're saying?

MR. SINCOFF: We say you are bound by Warsaw without Hague but supplemented by the agreement, the Montreal Agreement.

Jurisdiction of the court rests upon Warsaw. Now, the legal obligations of the parties are not confined just to Warsaw. The legal obligations can be more pervasive than the jurisdictional concept and that basically is our position.

The reason I urge Your Honor not to decide the treaty relationship issue is this: There are other actions that have been filed in this Court and elsewhere which are before the Court aside from the 52 and where the tickets were not purchased in the United States or if they were purchased in the United States, there is a question as to—

THE COURT: Destination?

MR. SINCOFF: Yes. And so consequently that will **[39]** be the subject of a very knotty problem.

I hope I have answered your Honor's question.

THE COURT: You have. Thank you.

Is there anything else that you wanted to say in rebuttal?

MR. SINCOFF: No, I am happy to rest.

THE COURT: Does anybody else have anything else they want to argue with respect to this motion?

(No response.)

THE COURT: We have had this problem involving Boeing and Litton in discovery.

Are the Boeing and Litton representatives here?

MR. TOMPKINS: Your Honor, do you intend to hear argument today on the Article 28 motions?

THE COURT: I will hear it if you are prepared and you would like to.

MR. TOMPKINS: Because that relates directly to the question and I can't seem to get an answer from Mr. Sincoff, that is that either the United States and Korea are in a treaty status or they

are not. I think that is the issue that the Court has to address in the Article 28 motion.

THE COURT: He wants to confine it to the Article 28 motions.

I did not indicate in my notice that we were going to have argument on that but if you are prepared, I can **[40]** certainly take a short break and then come back.

MR. TOMPKINS: I am happy to leave that before your Honor on the papers.

THE COURT: I think that it can be decided on the papers.

MR. SINCOFF: Yes.

THE COURT: I will try to move on those. I did anticipate that you would have some discussion about this discovery business.

Are you prepared to go into that now? Let me hear the position that you expressed in your motions.

I am willing to reconsider my first pretrial order. I think that is in essence what the plaintifffs want and so you want it, why don't you start off?

MR. SINCOFF: Your Honor, may I interrupt for a moment?

THE COURT: Surely.

MR. SINCOFF: Concerning your comments about the Article 28 motions, I was not referring to those. They deal with a few cases and what I was trying to say, your Honor, that there are other cases—

THE COURT: I know. There are all kinds of cases. We are going to have to have a chart. I knew what you were speaking of.

I am not really as confused as I sound. I have **[41]** read your papers but just sometimes it doesn't come out right.

MR. MADOLE: My name is Madole from Speiser, Krause & Madole, Co-chairman of the Plaintiffs Steering Committee.

On the issue of discovery, your Honor, February 8 after discussion with the various counsel for the defendants, I sent them a letter which has been the form that we have used throughout to notice discovery.

That letter was not uniformly received as good news by counsel for all of the defendants. I was advised by the defendant, the United States, through their counsel, that they were going to move for a protective order.

I was advised by counsel for the Boeing Company that I had not properly read the Court's order. I was advised by that defendant, that is, the Boeing Company, through their counsel, that they would not—that they would resist the depositions of Boeing Employees.

The protective order that I was advised that the United States Government was going to move for, that simply has not happened yet.

Yesterday afternoon, late afternoon, Mr. Dombroff called me and gave me some indication that we might be able to work out our problems with the defendant, the United States, and as a practical matter, your Honor, what the United States says was, why don't we do our discovery by a **[42]** different method?

Why don't we use interrogatories rather than depositions? I pointed out to the defendant, the United States, that when they recommended this some months ago, that on October 29, I provided them with the first set of interrogatories and as of the date of our discussion on the 15th, those interrogatories had not been answered at all.

When we did get the answers, your Honor, we find that the radar data and tapes from the two coastline radars no longer exist.

We are prepared to argue now, your Honor, on the reasons for asking for the discovery that we have asked for. The main thing we are after, your Honor, is a clear direction by this Court to all counsel that the route of flight of this aircraft is a relevant topic of discovery.

One of the problems has been that the defendant Korean Air Lines, the defendant the United States of America, Boeing defendants, when we go into the issue of the time and place where the aircraft was based on the ICAO data, we are spending an awful lot of time with a lot of speeches on the record and these very people, and these are the people that we have named, that for the United States government, for Boeing and for Litton and for Korean Air Lines, they actually participated in the activities of ICAO in establishing the flight path.

[43] We have all sorts of statements from the United States government, the Administrator of the FAA, that Flight 7 was

tracked for two and one-half hours and we tracked the Russian's tracking the airplane to its accident location.

Now, we believe this is completely irrelevant, that is, the flight path of this aircraft.

In all of the interrogation that has gone on so far with government witnesses, and I include the people that worked for the North American Air Defense Command, not once has any interrogation by the Plaintiffs Steering Committee been objected to because of security information. We are not asking for security information.

What we are asking for is a basic type of evidence used in an air crash case, that is, the flight path.

We are prepared to argue in detail on any of these. We asked for this hearing, your Honor, because we were told that a protective—motions for protective orders would be made. They have not been made.

THE COURT: I do not think they are going to be needed, either.

Does Boeing want to respond?

MR. MC LAUGHLIN: It is Boeing's position and I think the Court is in agreement in light of suggesting that it was the plaintiffs' burden to come forward on this and that the existing Court Order is a clear protective order **[44]** barring all discovery against Boeing until resolution of its dispositive motion.

The plaintiffs have already made a motion to permit discovery against Boeing and Litton and Boeing has filed its opposition to that.

I think it has stated numerous sound reasons and court precedents for why a continued stay of discovery, postponement of discovery against Boeing, is appropriate at this point until—

THE COURT: What is not appropriate is continued unresolution of the motions and so I am going to get on that.

MR. MC LAUGHLIN: We would appreciate that and I'm sure all parties would.

THE COURT: With respect to Boeing and Litton.

I don't know why your filed a motion for partial summary judgment against the motion to dismiss. I don't quite understand that. That puts me in a difficult posture.

I think the legal issued raised by your motion is one that ought to go on to the Court of Appeals.

MR. MC LAUGHLIN: It is our position that there were some facts such as the regulations governing interception, et cetera, that were outside of the pleadings and that summary judgment was the appropriate way to go and there were cases including one that you yourself had issued a ruling on that were summary judgments on the superseding cause issue **[45]** and if ever there was a case where summary judgment on superseding cause was appropriate, this was it.

Unless the Court has any questions, that is all I have to say.

THE COURT: No.

MR. MC LAUGHLIN: Thank you.

MS. VON FLATERN: Jan Von Flatern on behalf of the United States.

Your Honor, the reason that the Court has not seen a motion for protective order is in part the conversation that Mr. Madole referred to with Mr. Dombroff during which Mr. Madole indicated that he would give us, I believe on Monday, a letter which laid out in some detail exactly what he was looking for and why it was that he was asking for the specific witnesses.

It is not—I was not a party to that conversation and I am relying on Mr. Dombroff's report of it but with respect to a couple of Mr. Madole's comments, I think that they need to be answered.

One is that upon receiving the interrogatories, we learned for the first time that the radar data in question had been destroyed.

Your Honor, that was a subject of testimony back in October and November.

The radar data being referred to was just Air **[46]** Force data—air defense data which is recycled every 15 days. The tape on which it is kept is recycled every 15 days and after some specific effort to preserve, Mr. Madole and everyone else was told that such preservation had not taken place because within 15 days of this incident, the Air Force, the regional operations control center, had no idea that it was going to be involved or that that data would be useful in the litigation at any point.

Further the question as to whether—what the flight path of this airplane was and where it ended up is indeed relevant and neither the government nor any other defendant that I am aware of ever disputed that.

We have produced and I would represent to the Court that it has been represented to Plaintiffs Steering Committee that the government has produced everything it has on that subject.

The witnesses who have been requested almost without exception have nothing but nothing to do with it.

They have asked for a couple of air traffic controllers who are not radar controllers and we have agreed to produce them and they have asked for an Air Force officer whose superior has testified, the man who ran the regional operations control center or did so at the time, has testified about the purpose of the radar surveillance and in fact outbound aircraft such as 007 would have been are not monitored **[47]** or were not particularly at that time.

They have taken the deposition of the duty officer, the man that was actually there that night who said the same thing about the purpose of the monitoring and also said, I didn't see anything. If I had seen anything, I would have reported it to the senior director.

Now, they want the middle man. They know from the director of the whole unit what the purpose is and they had the man who was actually there, but now they want the middle man.

It is those kinds of requests that we don't see the purpose of and that require the transport of people from halfway around the world to get them here, or I guess conversely, the transport of all of us up there. But in either case, it is grossly wasteful.

What we have requested and the basis for the objection which yet may turn into a protective order, although I sincerely hope we can avoid that, is that they do some of this stuff by interrogatories, by requests for admissions.

They want a Coast Guard officer whose signature stamp happens to be on the promulgation of the search and rescue plan, and anyone who knows anything about the bureaucracy knows that the man will probably come in and say, yes, that is my signature stamp.

They have not asked us to admit to the authenticity **[48]** of the document which we would certainly be prepared to do.

They have not asked us to admit to the purpose that is laid out in that document which we would be prepared to do.

We just don't want this man to be brought in and taken off duty and sit there and say, yes, that is my signature.

So we have asked that the request be narrowed, that they be made more specific as to what they really want to do and not that they have any further discovery.

As I said, we are going to produce the two controllers on the data requested and we are trying to find one other witness who has been asked for by description, although we have not had much luck with that.

I am hopeful that Mr. Madole's efforts to make more specific his directions will enable us to work it out and that a protective order will not be necessary, but I do want the record to be clear that the government is not taking the position that anything that has to do to where this airplane actually went, how it ended up where it did in terms of the flight path is anything that we are trying to withhold. We are not.

I believe at the time of the government's motion for summary judgment the Court indicated that it understood that there may be things that will never be known and I do not intend to imply by that expansive statement that at some **[49]** point there might not be a national security concern that would have to be raised but as Mr. Madole said, they have not come up yet.

We have given them everything we have.

MR. MADOLE: May I respond?

THE COURT: Yes, you may afterwards.

MR. MC QUILLAN: Your Honor, my name is McQuillan. I represent Litton and from the receipt of Mr. Madole's letter, the proposed schedule listing witnesses to be deposed, one of whom was a Litton employee.

I contacted Mr. Madole and I do not wish to misrepresent anything that Mr. Madole said but it was my understanding that the result was, the telephone conversation was, that if I agreed to produce the one Litton employee listed, that that witness would not thereafter be recalled following any document production by Litton.

I trust I am not misrepresenting our telephone discussion. If I am, then our position is that we will not voluntarily produce this witness.

Mr. Madole and I discussed the question of the Litton document request that was served about a year or so ago by the Plaintiffs Steering Committee which has been stayed as a result of the pretrial Order.

It appeared to me that if my understanding of Mr. Madole's telephone conversation with me that this witness **[50]** would not be recalled following any production by Litton, that the entire document request addressed to Litton was just a listing of papers that he would like to have but he doesn't need and that we might just as well forget about any document production by Litton.

All he wants is one witness to testify to something that he allegedly did with ICAO which is another point, but that he really didn't need any of the documents that he had requested that Litton produce.

Now, with respect to that one witness, Mr. Madole stated this morning that at least with respect to the Litton man, and I believe he included some Boeing people, that this witness actually participated in establishing the flight path with ICAO.

Now that is simply not true. It's a misstatement of fact. The witness was present when certain simulated flight paths were run on the Boeing simulator at the request and under the direction of ICAO and at best, these are hypothetical flight paths.

They are not by any stretch of the imagination a recreation of an actual flight path flown by this airplane.

I don't think that Mr. Madole upon reconsideration would suggest that this or these were the flight paths. Actually, there were three different paths, and I don't know which one he is talking about. All three of these were **[51]** hypothetical and our position was and still is that if my understanding of Mr. Madole's conversation with me is correct, we will produce our witness but that he will not be recalled even if your Honor denies our motion and document production goes ahead.

Failing that, we will oppose the production of this witness at this time in this so-called second round of depositions that have been scheduled by the Plaintiffs Steering Committee.

MS. VON FLATERN: Your Honor, excuse me. I have been advised that I misspoke myself, and I mixed up the air traffic service and the Air Force. Actually, the radar tapes are only kept for 30 hours and not for 15 days.

THE COURT: In any event, we don't have them.

MS. VON FLATERN: We do not have them.

THE COURT: And we have not had them since shortly after the accident.

MS. VON FLATERN: That is correct.

THE COURT: Mr. Madole?

MR. MADOLE: You Honor, as to the defendant, the United States, it is certainly correct that Mr. Dombroff said to me on the telephone about 4:30 yesterday afternoon that if I would—if I would provide him with a letter setting up the details, because I had just gotten through explaining to him why his motion for protective order would not be well received as to the controllers, he agreed to bring the controllers in and I started to explain the rest of it, and he said if he could have a detailed letter by Monday that probably they would not file a motion for protective order.

Now, just so it is clear, your Honor, we have exhausted most of our negotiation leeways.

The United States government is trying to tell us that there is a better way to conduct discovery, and they are suggesting that we use interrogatories.

When we tried that, they lost the interrogatories for four months and when we finally got the answer, we found that, yes, documents were destroyed.

Now, as to Litton, Exhibit 64 produced by the United States government—pardon me, this is produced by Korean Air Lines—showed the team that participated both with ICAO and with the Korean government investigation team. Mr. Richard Parron, the project engineer, Exhibit 199, shows that all of the simulations that were made for ICAO so that ICAO could come up with a flight track, Mr. Parron participated as the expert on the Litton 72 inertial navigation system.

Based on those technical studies, Korean Air Lines, the United States government, ICAO, have come up with a probable flight path.

This really harkens back to the days, your Honor, when we didn't have flight data recorders and we proved by **[53]** circumstantial evidence where it was appropriate the flight path of an aircraft.

Here we know that this was an aircraft that was being controlled by a computer device and this computer device was built by Litton and the man that Litton sent to participate in this activity of this building the circumstantial evidence, that often is all we have to use, and the two men from Boeing are also the men, and it was Boeing where the simulation was actually done.

So I do not for a moment concede to Litton or to Boeing that the Court's Order prohibits these depositions. It specifically talks about document discovery. That's the title of the paragraph they cite which they didn't find important enough to put the title of that paragraph in the motion papers that they gave this Court and that is why we took the position that since we already have documents from Korean Air Lines and the United States government that show the activities of these individuals, the Court has just heard one of the best, I think, arguments for this discovery.

You got counsel for Litton saying no one will ever know—may ever know where that airplane went.

Now, your Honor, I submit that as an officer of this Court and the responsibility that this Court gave us when they appointed the Plaintiffs Steering Committee, we have an absolute duty to ascertain as close as we can within **[54]** the law and within the requirements of our practice the path that that aircraft took.

Counsel for the United States says why do they ask for Mr. Knapp. Mr. Knapp, your Honor, signed the search and rescue procedural order that called for any employee of the United States, whether they work for the Air Force or the Navy, the Department of Transportation or the Coast Guard, that any time they observed an aircraft in a position of peril or heading for a position of peril, that there was a duty to notify the search and rescue coordinator for that area and that area, your Honor, stretched from the coast of Alaska to the Kamchatka Peninsula, the entire area where this aircraft went off course and went towards its position of peril.

In that order, and not only that order but other documents produced by the government, they show that there was a whole flurry of activity about the Pacific region.

New search and rescue plans came out in the spring of 1983, new coordination programs between the Air Force, the FAA, the Coast Guard, for the particular area.

Yes, we have asked for the man whose name is on the order that requires direct line communication from the RCC, that is the regional control center to the FAA.

We have had some testimony and we had testimony from FAA controllers, from the director of air traffic control for the Anchorage region and from the colonel that had duties **[55]** related to monitoring with the Air Force and none of them know anything about the national search and rescue plan.

It is that plan that was signed by the Secretary of the Air Force, the Secretary of Defense, the Secretary of Transportation, back in 1981 and when in that plan in was said that in, amongst other places, in the specific region, in the oceanic region, which is that area where this airplane flew through that there was a duty on the part of any government employee, whether he worked for the Air Force, the Navy or the Department of Transportation, that if they saw an aircraft heading for a position of danger, that there was a duty to take the steps to warn and there was a procedure set up in these various government documents.

We want to see if that procedure was implemented, your Honor, because there is a line of cases that says that if it was supposed to be done and wasn't done that that raises liability.

I think that I have responded to the United States and to Litton. If the Court has any questions, I will be glad to respond to them.

THE COURT: Well, I think the observation was made that in seeking answers, for example, to this last question, you could probably ask for about 100 people and they could just go on and on. I don't know. I think it was. Maybe it was. I think Joe did it. I am not sure and you go **[56]** through deposition after deposition.

I think it was suggested that one way to find out is, was the plan implemented? When? Who had the authority to do so? Who did it? And then you can get the people.

MR. MADOLE: Your Honor, there is no question in my mind that the plan was implemented.

THE COURT: Well, that is what you said you need to know.

MR. MADOLE: What I am saying is that the method of implementation between the Coast Guard—

THE COURT: Ask them what it was supposed to be and by whom it was implemented. When was it implemented? Then you begin to pinpoint it and then they say Joe in the Coast Guard was supposed to do it. He had the authority and then you can notice him.

MR. MADOLE: Your Honor, I would submit that we could do that faster in one day of depositions than we can in a year of interrogatories, and the interrogatory comes in and it gets staffed and then it goes through—well, your Honor knows.

THE COURT: Well then don't do it by way of interrogatories. Request for admissions would do the same thing, wouldn't it?

I am concerned about only one thing. Let me put this in perspective for you again.

[57] There isn't any question, any doubt, that we have got to find out all we can short of violating military secrets to see about what happened to that airplane on September 1st, 1983.

There isn't any doubt in my mind that everybody in the present context of this litigation is entitled to use all reasonable efforts to find out where it went and more importantly, if we can, why it went where it went.

Now, that is what we are trying to find out, where it went and why it went there because the why determines who is going to be in this case as defendants besides KAL. They can't get out. They are here. They are stuck.

Boeing, Litton, the United States, no, not yet, although Litton and Boeing may have put some legal arguments to us.

I thought it was clear, and we have not had any problems up to this juncture so far as I now, that that is what we were going to focus on.

The government had the facilities, and they had the basic data because of whatever control they had at Anchorage so that is where we started our discovery. Isn't that correct?

MR. MADOLE: That is correct, your Honor.

THE COURT: Now, it develops that other discovery is related to that. That is where we are at this juncture **[58-59]** and I think that all Boeing and Litton is saying really is that before we go through this next thing which they know is coming, I ought to get off my decisions on the pending motions.

They have got their fingers crossed and they might get lucky. They are hoping against hope.

If I go one way, you go to the Court of Appeals and I would certify it immediately.

If I go the other way, you would just go ahead with your second phase of discovery.

I will rule on those motions as quickly as I can, that is, Boeing's motion for partial summary judgment and Litton's motion to dismiss under 12(B) on the superseding cause. That is a very interesting legal question.

The government has not filed anything yet. They will come along a little later, I guess.

I am not suggesting that you need to go any particular route. I think you are experienced enough to know what you have to do based on what you have already done and look, these government people can get all around this world in 15 minutes for anything else so they are just going to have to get around the world for this case because the implications are fantastic and there is a substantial liability in terms of the whole thing, so we are just going to have to bear that expense.

[60] I have to have confidence that you are not going to do unnecessary crazy things. I think you have better things to do with your time and it is a fact that representing, as you do, the number of people that you do, and representing them through their other counsel, you have a tremendous legal obligation vis-a-vis what your ethical responsibilities are as lawyers.

You know, it is all right for me to be second guessed but it is a different thing for you as practicing lawyers to be second guessed by every lawyer in the country who thinks he is an expert because he has a couple of clients.

I am not going to put you in that position. I know exactly what you are going through and I have had no indications to date that anything you have done has been done out of anything except what has been in your judgment what is necessary to move this case along.

I will bear my share of the blame for any delay that has occurred but there are some things that I have to puzzle with.

I don't have all the expertise that you have. I have to acquire it. You all are specialists and that is part of the problem and maybe one day we will have a special court only for air disasters where you will have on the court people who know all this and who have been to the Hague and to the Warsaw and every place else.

[61] MR. MADOLE: Your Honor, technically, we don't have the motion for a protective order.

THE COURT: No.

MR. MADOLE: I want to assure the Court that we will do our best to work this out with the government but it seemed appropriate for the Court to know what we are trying to do.

THE COURT: I can understand and I make these statements as I do to let you know how I feel about it and the approach that I'm going to take if it hits the fan.

Any lawyer can file anything in this case that he thinks is appropriate and I will deal with it with all deliberate speed.

You know what that has meant in the past and that one has not been reversed yet.

MR. MADOLE: I would suggest to the Court that the Court's statement about the consideration that has been given to these questions, intricate questions of law, and there are those of us who have practiced in this field for a couple of decades, at least, and we are still puzzling over the same questions.

THE COURT: I have read articles and opinions on both sides, back and forth, and you all have participated in some of them.

[62] MR. MADOLE: That is all I have to say if the Court has nothing further.

THE COURT: I am still puzzled by the opinion from the Second Circuit.

Is there anything else that we can do, any other matter?

(No response.)

THE COURT: Let's see. I did have a list. Did you indicate that you wanted argument on your motion for default? Do you want argument on that?

I do not want to ever preclude argument, and if you want to argue that and your motion under 28, I will set it down and we can agree on another hearing date.

MR. MADOLE: Your Honor, there already has been argument on the Article 28.

THE COURT: Yes.

MR. MADOLE: As to the motion for default judgment against the USSR, with a sense of fairness and frankly because the liaison counsel, my law partner, wrote the motion, I think we are ready to stand on the papers.

I am not sure that the Russians would show up to argue against it anyway.

THE COURT: I have to decide whether the Russians are even here, you know.

MR. MADOLE: Yes, sir.

[63] THE COURT: You ran into Toskin but I have not seen him yet.

MR. MADOLE: The Plaintiffs Steering Committee is willing to submit that motion on its papers.

THE COURT: That is the real question. Are they here?

MR. MADOLE: Yes. If the Court wants argument—

THE COURT: No, I enjoy listening to you argue but I don't want it necessarily, but I just don't want to deny you the opportunity if you believe you need it.

So that is another one that I will try to get out.

MR. MADOLE: I believe Article 28 has been argued, your Honor.

THE COURT: Yes, you are right.

MR. MADOLE: Unless other parties want it, the Plaintiffs Steering Committee does not make that request.

THE COURT: Do I have anything else?

All right, that will be all then. Thank you.

(Whereupon, the hearing was concluded.)

Certificate of Reporter

This record is certified by the undersigned to be the official transcript of the above-entitled hearing.

/s/ Dawn T. Copeland

Official Court Reporter

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL. NO. 565
MISC. DOCKET NO. 83-0345

CIVIL ACTION NOS. 83-3448, 83-3450, 83-3454, 83-3457, 83-3458, 83-3459, 83-3463, 83-3465, 83-3466, 83-3469, 83-3470, 83-3473, 83-3792, 83-3890, 83-3898, 83-3902, 83-3903; 84-0029

Filed Sep 24 1985

IN RE: KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1985

CERTIFICATION FOR APPEAL UNDER
28 U.S.C. § 1292(b)

I certify that the issue disposed of by this Court's Memorandum and Order of July 25, 1985, which held that Korean Air Lines is entitled to avail itself of the limitation of damages provided by the Warsaw Convention and Montreal Agreement despite its defective tickets, involve controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

/s/ AUBREY E. ROBINSON, JR.
Aubrey E. Robinson, Jr.
Chief Judge

DATE: September 23, 1985

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5982—September Term, 1985

Misc. 83-00345

Filed April 8, 1986

In Re: Korean Air Lines Disaster of September 1, 1983

Plaintiffs' Steering Committee,

Appellants

BEFORE:

Scalia and Buckley*, Circuit Judges
McGowan, Senior Circuit Judge

ORDER

Upon consideration of Plaintiffs' Steering Committee's Petition for Leave to Appeal Pursuant to 28 U.S.C. § 1292(b), the response and reply thereto, and the Motion By Petitioners To Expedite Determination of Petitioners' Leave to Appeal Pursuant to 28 U.S.C. § 1292(b), it is ORDERED as follows:

1. The motion to expedite determination of the petition for leave to appeal is granted.

2. The petition for leave to appeal pursuant to 28 U.S.C. § 1292(b) is granted. The district court has properly found that

* Circuit Judge Buckley did not participate in this order.

the requirements of 28 U.S.C. § 1292(b) are satisfied, and wise exercise of our discretion dictates that the appeal be allowed.

3. The following briefing schedule shall apply.

Appellants' brief and record excerpts	May 7, 1986
Appellee's brief	June 6, 1986
Appellants' reply brief, if any	June 23, 1986

4. The Clerk is directed to transmit a certified copy of this order to the district court pursuant to a Fed. R. App. P. 5.

Per Curiam

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5982—September Term, 19

C.A. Misc. 83-00345

Filed April 8, 1986

In Re: Korean Air Lines Disaster of September 1, 1983

Plaintiffs' Steering Committee,

Appellants

ORDER

It appearing that an order was entered this date granting leave to appeal to 28 U.S.C. § 1292(b), it is

ORDERED that the Clerk of the District Court, upon payment of the docketing fee, shall certify and transmit to this Court a preliminary record in the above-stated docket number.

For the Court:

George A. Fisher, Clerk

By: /s/ CATHERINE BATEMAN
Catherine Bateman
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5982—September Term, 1986

Misc. 83-00345

Filed January 30, 1987

In Re: Korean Air Lines Disaster of September 1, 1983

Plaintiff's Steering Committee,

Appellant

Before:

Ruth B. Ginsburg, Stephen F. Williams and
D. H. Ginsburg, Circuit Judges

ORDER

This interlocutory appeal from the district court's denial of plaintiff's motion for partial summary judgment was taken pursuant to 28 U.S.C. § 1292(b). Because we are unable to determine the precise scope of the district court's order denying plaintiffs' motion, we hereby remand the record in this case for clarification.

The civil actions consolidated in this appeal were transferred to the district court by the Judicial Panel on Multidistrict Litigation for pretrial proceedings pursuant to 28 U.S.C. § 1407(a). The cases can be grouped into three categories on the basis of the fora in which they were originally filed and to which they

are to be remanded at or before the conclusion of pretrial proceedings, unless the actions are earlier terminated: (a) the Southern and Eastern Districts of New York; (b) the Eastern District of Michigan and the District of Massachusetts; and (c) the District of Columbia. The district judge, in his order denying plaintiffs' motion for partial summary judgment, did not expressly consider the contention that, by analogy to the principle set forth in *Van Dusen v. Barrack*, 376 U.S. 612 (1964), he was bound by Second Circuit precedent in resolving the claims of plaintiffs in the first category enumerated above.

The extent of a transferee court's authority under 28 U.S.C. § 1407 independently to resolve issues of law already passed upon by the federal court of appeals for the circuit in which the transferor forum is located is apparently a question of first impression, and our consideration of this issue is hampered by uncertainty as to which plaintiffs were covered by the district court's July 1985 order.* Accordingly, we remand the record so that the district court may clarify the reach of its ruling.

Nothing in this order shall in any way preclude the district judge from continuing to superintend consolidated pretrial proceedings in these cases under the authority granted in 28 U.S.C. § 1407(b).

Per Curiam
For the Court:

GEORGE A. FISHER, Clerk

By: /s/ PATRICIA L. CHATMAN
Patricia L. Chatman
Deputy Clerk

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* Concerning the cases filed in New York, the district judge observed at argument of the motion for partial summary judgment: "I know that I am bound by the Second Circuit. [Section] 1407 says that, but the rest of it I am not so sure I am bound by." Joint Appendix (J.A.) 766. *See also* J.A. 49 (Memorandum accompanying plaintiffs' motion stated: "The Polish Airlines decision [In re Air Crash Disaster at Warsaw, Poland, 705 F.2d 85 (2d Cir. 1983)] . . . render[s] [KAL] liable as a matter of law for full damages in the actions commenced in New York.").

We leave to the district court's sound discretion the question whether to direct or invite the parties to brief the issue of that court's authority to rule dispositively on the liability limitation with regard to plaintiffs who commenced their actions in district courts outside this circuit.

Memorandum Opinion of the United States District Court

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

MDL Docket No. 565

Misc. Nos. 83-0345, 83-3448, 83-3450, 83-3454, 83-3457, 83-3458, 83-3459, 83-3463, 83-3465, 83-3466, 83-3469, 83-3470, 83-3473, 83-3792, 83-3890, 83-3898, 83-3902, 83-3903, 83-0029

IN RE:

KOREAN AIR LINE DISASTER OF SEPTEMBER 1, 1983

MEMORANDUM

This matter comes before the Court pursuant to the January 30, 1987 remand of the Court of Appeals for the District of Columbia Circuit. The Court of Appeals, in considering an interlocutory appeal from this Court's denial of Plaintiffs' Motion for Partial Summary Judgment, was unable to determine the precise scope of this Court's Order. The problem centered around the question of whether the principles of *Van Dusen v. Barrack*, 376 U.S. 612 (1964), required the Court to apply Second Circuit precedent to actions originally filed in New York federal courts and then transferred to the District of Columbia pursuant to 28 U.S.C. § 1407(a). The parties have fully briefed this issue and the Court holds that its July 25, 1985 Memorandum and Order applies to all three categories of actions enumerated by the Court of Appeals.

In *Van Dusen v. Barrack*, the Supreme Court held that in diversity actions, changes of venue within the federal system do not change the *state* law which is applied to the cases. The Court wrote that "[a] change of venue under § 1404(a) generally should be, with respect to state law, but a change of

courtrooms." *Van Dusen*, 376 U.S. at 639. The Court based its decision on the principles of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938):

> The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to to a substantially different result.

Van Dusen, 376 U.S. at 638 (quoting *Guaranty Trust Co. v. York*, 326 U.S. 99, 100 (1945). The Court applied this policy to transfers pursuant to 28 U.S.C. § 1404(a) to "ensure that the 'accident' of federal diversity jurisdiction does not enable a party to utilize a transfer to achieve a result in a federal court which could not have been achieved in the Courts of the State where the action was filed." *Id.*

Because the principles underlying *Van Dusen* and *Erie* have at their foundation questions of the application of state law, neither is applicable to the situation presented here which involves conflicts between the Circuits concerning federal law. While it is true that several courts (including this Court) have applied the *Van Dusen* rule to claims involving federal law, they have failed to recognize the significance of this distinction.

"The federal courts comprise a single system applying a single body of law, and no litigant has a right to have the interpretation of one federal court rather than of another determine his case." *H.L. Green Co. v. MacMahon*, 312 F.2d 650, 652 (2d Cir. 1962), *cert. denied*, 372 U.S. 928 (1963) (citations omitted). *See also*, *In re The Pittsburgh*, 543 F.2d 1058, 1065 n. 19 (3d Cir. 1976) ("[I]n theory, at least, federal law, in its area of competence, is assumed to be nationally uniform, whether or not it is in fact.") What this means in practice is that each federal court is bound to apply federal law the way it believes is appropriate. In the case at hand, this meant that the Court was to thoroughly analyze and consider Second Circuit law (and the law of every other Circuit for that matter) but not to blindly accept it. The conclusion of the

Court's analysis on the issue at hand was that for the reasons stated in its July 25, 1985 Memorandum and Order, the Court did not agree with the holding of *In re Air Crash Disaster of Warsaw, Poland, on March 14, 1980*, 705 F.2d 85 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983) and instead applied what it believed to be an accurate interpretation of federal law. This interpretation applied equally to those actions commenced in federal district courts in New York, Michigan, Massachusetts and the District of Columbia.

Plaintiffs argue in their Memorandum that if transferee courts were to consider cases as described above, the uniformity expressed by *Van Dusen* would be destroyed. While this may be true in the short-run, the long-term benefits of each federal court independently considering an issue are substantial. In this way, an issue may be viewed from several unique perspectives. If at the conclusion of these various analyses more than one interpretation of federal law exists, the Supreme Court of the United States can finally determine the issue and restore uniformity in the federal system. The uniformity achieved in this matter is an "informed uniformity" unlike the "blind uniformity" which would result from one court applying the interpretation of another by rote.

Plaintiffs also argue that because the case at hand was transferred to the District of Columbia for a limited purpose and shall be returned to the federal courts in New York, this Court should not create a conflict between the law of the case (which would be the law of this Circuit) and stare decisis (which would instruct the District Courts to follow the decisions of their own Court of Appeals). The Court believes, however, that the law of the case clearly controls this situation. Once a court finally decides any issue of law, the law of the case holds that the ruling should be adhered to by a transferor court. If this were not true, and tranferor courts were free to readjudicate issues determined by tranferee courts, tranfers pursuant to 28 U.S.C. § 1407 could become meaningless exercises perpetuating the very duplication they were designed to eliminate. This is not to say that the parties to an action must suffer for the sake of more efficient proceedings. As previously

stated, if a litigant believes he or she has been denied a favorable and correct interpretation of federal law, the Supreme Court is available to finally decide the question after an application for certiorari. This should be the course of the present litigation.

/s/ AUBREY E. ROBINSON, JR.
Aubrey E. Robinson, Jr.
Chief Judge

DATE: May 7, 1987

Opinion of Court of Appeals for the
District of Columbia Circuit

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5982

IN RE: KOREAN AIR LINES DISASTER OF
SEPTEMBER 1, 1983

PLAINTIFF'S STEERING COMMITTEE, APPELLANT

Appeal from the United States District Court
for the District of Columbia
(Misc. No. 83-00345)

Argued January 20, 1987

Decided September 25, 1987

Milton G. Sincoff, with whom *Donald W. Madole* and *Steven R. Pounian* were on the brief for appellant.

George N. Tompkins, Jr. for appellee.

Before: RUTH B. GINSBURG, WILLIAMS, and D.H. GINSBURG, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* RUTH B. GINSBURG.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Concurring opinion filed by *Circuit Judge* D.H. GINSBURG, in which *Circuit Judge* WILLIAMS joins.

GINSBURG, RUTH B., *Circuit Judge*: This case arises out of an air disaster and raises turbulent federal questions. On September 1, 1983, Korean Air Lines (KAL) Flight 007, a commercial craft departing from Kennedy Airport in New York and bound for Seoul, South Korea, was destroyed over the Sea of Japan by Soviet Union military aircraft. Wrongful death actions were filed against KAL in several federal district courts; the Judicial Panel on Multidistrict Litigation transferred these actions to the District Court for the District of Columbia for pretrial proceedings pursuant to 28 U.S.C. § 1407 ("[C]ivil actions involving one or more common questions of fact . . . pending in different districts . . . may be transferred to any district for coordinated or consolidated pretrial proceedings.").

The nub of the controversy relates to the per passenger damage limitation of the Warsaw Convention,[1] raised to $75,000 by an accord among airlines known as the Montreal Agreement.[2] By motion for partial summary judgment, plaintiffs sought a declaration "that [KAL] is liable without fault for compensatory damages without any limitation of $75,000." Joint Appendix (J.A.) at 26. Plaintiffs grounded this motion on the inadequate type size of the liability limitation notice printed on KAL passenger tickets. The notice appeared in 8 point type; the Montreal Agreement specifies 10 point type. Denying plaintiffs' motion, the district court, on July 25, 1985,

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. § 1502 note (1982).

[2] Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB Agreement 18900, 31 FED. REG. 7302 (1966) (approved by CAB Order E-23680, May 13, 1966).

held that KAL could avail itself of the $75,000 per passenger limitation. *In re Korean Air Lines Disaster of September 1, 1983*, 19 Av. L. Rep. (CCH) 17,584 (D.D.C. 1985). In so ruling, the district court considered and rejected contrary Second Circuit precedent: *In re Air Crash Disaster at Warsaw, Poland, on March 14, 1980*, 705 F.2d 85 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983).

On September 24, 1985, the district court certified for interlocutory appeal under 28 U.S.C. § 1292(b) the question whether KAL "is entitled to avail itself of the limitation of damages provided by the Warsaw Convention and Montreal Agreement despite its defective tickets." We ruled that the requirements of section 1292(b) were met and that "wise exercise of our discretion dictates that the appeal be allowed." D.C. Cir. Order filed April 8, 1986.

On January 30, 1987, after argument of the appeal, we remanded the record for clarification of the scope of the district court's order denying plaintiffs' partial summary judgment motion. Specifically, we observed that the cases consolidated in this appeal

> can be grouped into three categories on the basis of the fora in which they were originally filed and to which they are to be remanded at or before the conclusion of pretrial proceedings, unless the actions are earlier terminated: (a) the Southern and Eastern Districts of New York; (b) the Eastern District of Michigan and the District of Massachusetts; and (c) the District of Columbia. The district judge, in his order denying plaintiffs' motion for partial summary judgment, did not expressly consider the contention that, by analogy to the principle set forth in *Van Dusen v. Barrack*, 376 U.S. 612 (1964), he was bound by Second Circuit precedent in resolving the claims of plaintiffs in the first category enumerated above.

> The extent of a transferee court's authority under 28 U.S.C. § 1407 independently to resolve issues of [federal] law already passed upon by the federal court of appeals for the circuit in which the transferor forum is located is apparently a question of first impression, and our consideration of this issue is hampered by uncertainty as to which plaintiffs were covered by the district court's July 1985 order.

D.C. Cir. Order filed January 30, 1987.

By Memorandum dated May 7, 1987, the district court held that its July 25, 1985 decision denying plaintiffs' partial summary judgment motion applies to all three categories of cases described in this court's January 30, 1987 remand-for-clarification order. We now affirm the district court's dispositions. On the Warsaw Convention/Montreal Agreement $75,000 per passenger damage limitation issue, we adopt as our opinion the comprehensive July 25, 1985 Memorandum of the district court, and we reprint that disposition as an appendix hereto. We set out below our reasons for concluding that the district court properly adhered to its own interpretation of the Warsaw Convention/Montreal Agreement in all actions, including those transferred from district courts within the Second Circuit.

The Supreme Court, in *Van Dusen v. Barrack*, 376 U.S. 612 (1964), addressed and resolved this question: when a defendant in a diversity action moves for a venue transfer under 28 U.S.C. § 1404(a),[8] which state's law applies post-transfer? The state law that would have applied in the transferor court adheres to the case, the Supreme Court held; in the Court's words, "with respect

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[8] Under this change of venue prescription, "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

to state law," the venue change will accomplish "but a change of courtrooms." *Van Dusen*, 376 U.S. at 639.[4]

The *Van Dusen* interpretation of 28 U.S.C. § 1404(a), as the latter applies in diversity actions, rests on principles advanced in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), and cases in the *Erie* line. *Van Dusen*, 376 U.S. at 637-40; *see particularly Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 387 (1941) (on issues of state law arising in diversity cases, federal courts must apply choice-of-law rules of states in which they sit). Justice Goldberg explained for the Court in *Van Dusen*:

> [O]ur interpretation [of § 1404(a)] . . . is supported by the policy underlying *Erie*[.] . . . [W]e should ensure that the "accident" of federal diversity jurisdiction does not enable a party to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed. . . . What *Erie* and the cases following it have sought was an identity or uniformity between federal and state courts; and the fact that in most instances this could be achieved by directing federal courts to apply the laws of the States "in which they sit" should not obscure that, in applying the same reasoning to § 1404(a), the critical identity to be maintained is between the federal district court which decides the case and the courts of the State in which the action was filed.

Van Dusen, 376 U.S. at 637-39 (footnotes omitted).

Defendants in *Van Dusen* sought to transfer the case from the Eastern District of Pennsylvania to the District of Massachusetts. (Massachusetts, but not Pennsylvania, limited the damages plaintiffs could recover.) Were the transfer to be made, the Supreme Court ruled, though all further proceedings would take place in the Massachusetts district court, Pennsylvania law, not Massachusetts law, would furnish the governing state prescriptions.

The question before us is whether the *Van Dusen* rule—that the law applicable in the transferor forum attends the transfer—should apply to transferred federal claims. It is a question meriting attention from Higher Authority. Congress, it appears, has not focused on the issue,[5] nor has the Supreme Court addressed it. The Judicial Panel on Multidistrict Litigation assumed, on at least one occasion, that the *Van Dusen* rule would apply to transferred federal claims, *see In re Plumbing Fix-*

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[4] The *Van Dusen* Court expressly did not decide whether the law of the state in which the transferor court sits would apply if plaintiff rather than defendant sought the transfer, or if a state court in the transferor court's state would dismiss the case on forum non conveniens grounds. *Van Dusen*, 376 U.S. at 640. Wright, Miller & Cooper indicate that several courts have applied the law of the transferor court even when plaintiff rather than defendant, moves for a transfer. 15 C. WRIGHT, A. MILLER & E. COOPER, *Federal Practice and Procedure* § 3846, at 367 (2d ed. 1986). A strong argument, however, favors application of the law of the transferee state in such instances. *See* ALI, *Study of Division of Jurisdiction Between State and Federal Courts*, § 1306(c) & commentary (1969).

[5] In Senate hearings on the bill that eventually became the multidistrict litigation statute, two witnesses stated that *Van Dusen* would apply to choice-of-law issues under the measure. The experience of those witnesses related to federal claims for antitrust law violations and it may be that they intended their statements to cover such claims. *See Multidistrict Litigation: Hearings on S. 3815 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 13, 25 (1966) (statements of Dean Phil Neal and Judge William Becker). The Supreme Court, however, in explicit and repeated qualifications, confined its *Van Dusen* opinion to questions of state law. *See* 376 U.S. at 625-26, 630, 633, 635, 639. The snippet of legislative history just described, therefore, is at best equivocal; the two witnesses perhaps "mean[t] only that *Van Dusen* would apply to state law issues in cases transferred under the new statute." Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 710-11 (1984).

tures Litigation, 342 F.Supp. 756, 758 (J.P.M.D.L. 1972),[6] but the Panel, from what we can glean, has given the matter only fleeting consideration.[7] Recognizing that the question is perplexing, particularly in the context of 28 U.S.C. § 1407, a statute authorizing transfers only for pretrial purposes, we are persuaded by thoughtful commentary that "the transferee court [should] be free to decide a federal claim in the manner it views as correct without deferring to the interpretation of the transferor circuit." Marcus, *Conflict Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 721 (1984); *see also* Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U. PA. L. REV. 595, 662-706 (1987).

As the district court stressed in response to our remand, the *Erie* policies served by the *Van Dusen* decision do not figure in the calculus when the law to be applied is federal, not state. Given the reality of conflict among the circuits on the proper interpretation of federal law, however, why deny to a plaintiff with a federal claim the "venue privilege" a diversity claimant enjoys? Plaintiffs in the *Van Dusen* situation could effectively pick Pennsylvania rather than Massachusetts law and retain the benefit of that choice after transfer. Why deny a similar right of selection and retention to plaintiffs who would fare better under the Second Circuit's

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[6] In *Plumbing Fixtures*, a plaintiff resisted § 1407 transfer of his price-fixing claim on the ground that under transferee forum precedent, his standing to sue would be rejected. The Panel stated, with no elaboration: "It is clear [under *Van Dusen*] that the substantive law of the transferor forum will apply after transfer." 342 F.Supp. at 758.

[7] Several lower courts have also declared, without exposition, that *Van Dusen*'s reasoning would apply to transferred federal claim cases. *See* Marcus, *supra* note 5, 93 YALE L.J. at 692-93 & n.100 (citing cases). Other lower courts have stated that *Van Dusen* does not apply to transferred federal claims. *Id.* at 693 n.102 (citing cases).

interpretation of federal law than under the D.C. Circuit's interpretation?

The point has been cogently made that venue provisions are designed with geographical convenience in mind, and not to "guarantee that the plaintiff will be able to select the law that will govern the case." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 n.24 (1981); *see* Marcus, *supra*, 93 YALE L.J. at 696-701. In diversity cases, however, federal courts are governed by *Klaxon* and therefore may not compose federal choice-of-law principles; instead, they must look to state prescriptions in determining which state's law applies. With "no federal choice-of-law principles that favor the application of the law of one state over the law of another," the diversity plaintiff's opening move or "venue privilege" ordinarily fills the gap—it "prevails by default." Marcus, *supra*, 93 YALE L.J. at 700-01. For the adjudication of federal claims, on the other hand, "[t]he federal courts comprise a single system [in which each tribunal endeavors to apply] a single body of law," *H.L. Green Co. v. MacMahon*, 312 F.2d 650, 652 (2d Cir. 1962), *cert. denied*, 372 U.S. 928 (1963); there is no compelling reason to allow plaintiff to capture the most favorable interpretation of that law simply and solely by virtue of his or her right to choose the place to open the fray.

As summarized in the commentary we find persuasive:

> The *Van Dusen* Court stressed the venue privilege because [under *Klaxon*] there is no federal principle by which to select the state law that should govern diversity cases. Where federal claims are transferred, however, the principle that the transferee federal court is competent to decide federal issues correctly indicates that the transferee's interpretation should apply.
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> . . .
>
> For federal courts, the most significant choice-of-law difference between issues of state law and issues

> of federal law is that they lack competence to [develop rules of decision for] the former and are presumptively competent to decide the latter. . . . [T]he federal courts have not only the power but the duty to decide [issues of federal law] correctly. There is no room in the federal system of review for rote acceptance of the decision of a court outside the chain of direct review. If a federal court simply accepts the interpretation of another circuit without [independently] addressing the merits, it is not doing its job.

Marcus, *supra*, 93 YALE L.J. at 679, 702; *see also* Friendly, *The "Law of the Circuit" and All That*, 46 ST. JOHN'S L. REV. 406, 412 (1972) ("I take [*Van Dusen*] to be limited to choices of *state* law.") (emphasis in original).

Application of *Van Dusen* in the matter before us, we emphasize, would not produce uniformity. There would be one interpretation of federal law for the cases initially filed in districts within the Second Circuit, and an opposing interpretation for cases filed elsewhere. Applying divergent interpretations of the governing federal law to plaintiffs, depending solely upon where they initially filed suit, would surely reduce the efficiencies achievable through consolidated preparatory proceedings. Indeed, because there is ultimately a single proper interpretation of federal law, the attempt to ascertain and apply diverse circuit interpretations simultaneously is inherently self-contradictory. Our system contemplates differences between different states' laws; thus a multidistrict judge asked to apply divergent state positions on a point of law would face a coherent, if sometimes difficult, task. But it is logically inconsistent to require one judge to apply simultaneously different and conflicting interpretations of what is supposed to be a unitary federal law.[8]

[8] Even if it appears plausible to legal minds to mete out in a consolidated case one version of federal law to plaintiffs whose counsel filed in the Southern or Eastern District of New York, another to plaintiffs whose counsel filed in the District Court for the District of Columbia, it would be difficult to explain the rationality of such divergencies to the lay persons served by the federal judicial system.

The district judge in the instant case observed that

> [i]f . . . more than one interpretation of federal law exists, the Supreme Court of the United States can finally determine the issue and restore uniformity in the federal system. The uniformity achieved in this [way] is an "informed uniformity" unlike the "blind uniformity" which would result from one court applying the interpretation of another by rote.

May 7, 1987 D.D.C. Memorandum at 4. We agree. The federal courts spread across the country owe respect to each other's efforts and should strive to avoid conflicts, but each has an obligation to engage independently in reasoned analysis. Binding precedent for all is set only by the Supreme Court, and for the district courts within a circuit, only by the court of appeals for that circuit.

We return, finally, to the most anomalous feature of this case. As earlier observed, we deal here not with an "all-purpose" transfer under 28 U.S.C. § 1404(a), but with a transfer under 28 U.S.C. § 1407 "for coordinated or consolidated pretrial proceedings." We have held, in accord with the district court, that the law of a transferor forum—here, the law of the Second Circuit—merits close consideration, but does not have stare decisis effect in a transferee forum situated in another circuit. Should the several cases consolidated for pretrial preparation in the instant proceeding eventually return to transferor courts outside this circuit,[9] would our district court's

[9] In practice, it has been reported, most cases transferred under § 1407 are not remanded. *See* 1986 Ann. Rep. Director Admin. Off. U.S. Courts 128 (as of June 30, 1986, 15,026 actions had been subject to § 1407 proceedings; of those, 10,903 had been terminated by the transferee court); Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and*

Warsaw Convention/Montreal Agreement ruling, which we have affirmed, have binding force? We believe it should, as "law of the case," for if it did not, transfers under 28 U.S.C. § 1407 could be counterproductive, *i.e.*, capable of generating rather than reducing the duplication and protraction Congress sought to check. *See* Steinman, *supra*, 135 U. PA. L. REV. at 664-67, 700-704. On this issue in the case at hand, however, our circuit is not positioned to speak the last word.

We affirm the order of the district court that KAL is entitled to avail itself of the limitation on damages provided by the Warsaw Convention and raised to $75,000 by the Montreal Agreement; and we note again that the proper interpretation of the Convention and Agreement, as well as the scope of the transferee court's interpretive authority in a case such as this one, are matters in need of definitive resolution for our national court system.

Affirmed.

Transferred Cases and in Multidistrict Litigation, 135 U. PA. L. REV. 595, 667 & n.247, 700 & nn.410, 411 (1987); Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts, and Transferee Courts*, 78 F.R.D. 575, 583 (1978).

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL No. 565
Misc. Docket No. 83-0345

IN RE: KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1983

Civil Action Nos. 83-2793,
83-2941, 83-3154, 83-3177,
83-3204, 83-3441, 83-3445,
83-3448, 83-3449, 83-3450,
83-3451, 83-3452, 83-3453,
83-3454, 83-3455, 83-3456,
83-3457, 83-3458, 83-3459,
83-3460, 83-3461, 83-3462,
83-3463, 83-3464, 83-3465,
83-3466, 83-3467, 83-3468,
83-3469, 83-3470, 83-3473,
83-3474, 83-3587, 83-3588,
83-3792, 83-3793, 83-3889,
83-3891, 83-3898, 83-3901,
83-3902, 83-3903; 84-0029,
84-0030, 84-0402

MEMORANDUM AND ORDER

INTRODUCTION

Before the Court is a motion for summary judgment on the sole issue of the enforceability of the limitation on damages established by the Warsaw Convention (Conven-

tion)[1] and asserted by Defendant Korean Air Lines Co., Ltd. (Korean Air Lines) in the above-captioned multidistrict litigation. These Plaintiffs argue that, as a matter of law, Korean Air Lines is liable to them to the full extent of their damages for having delivered defective tickets to their decedents, passengers killed when a commercial airliner (KAL 007) owned and operated by Defendant was tragically destroyed by Soviet military aircraft over the Sea of Japan.

The material facts are undisputed. Defendant delivered tickets to Plaintiffs' decedents before their "international transportation" began. The tickets contained notice of the applicability of the Warsaw Convention's rules limiting Korean Air Lines' liability. The notice was printed in 8.0 type size. Since the passenger tickets at issue included a point of origin, destination or stopping place within the United States, the provisions of the Montreal Intercarrier Agreement (Montreal Agreement),[2] are also relevant. The question before the Court is whether the failure to print notice to passengers of the applicability of the Warsaw Convention in 10-point modern type size, as required by the Montreal Agreement, strips the carrier of the Convention's liability limitation. Having considered the treaty, its history and development, and all evidence presented, the Court concludes that the carrier cannot be prevented from availing itself of the limitation; Plaintiffs' motion shall be denied.

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. § 1502 note (1982).

[2] Agreement Relating to Liability Limiations of the Warsaw Convention and the Hague Protocol, CAB Agreement 18900, 31 FED. REG. 7302 (1966) (approved by CAB Order E-23680, May 13, 1966).

HISTORY OF THE WARSAW CONVENTION

Before considering this motion, it is necessary to clearly understand the Warsaw Convention. It is a multilateral treaty intended to uniformly regulate international airline transportation. Today, more than 120 nations adhere to the rules contained in the Convention. Originally negotiated at two international conferences, the first in Paris in 1925 and the second in Warsaw in 1929, the Convention had a dual purpose. In recognition of the fact that the newly emerging air industry would link many nations of divergent systems and laws, the first goal was to establish some degree of uniformity as to documentation for tickets and the like and as to the procedure and substantive rules of law which would govern claims arising out of international transportation by air. Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 498-99 (1967). In order to help the then fledgling air industry to attract needed capital, the second goal was to limit the potential liability of the air carriers in the case of accidents. Clearly recognized as the more important goal of the Convention, in Article 22(1), the limitation on liability was set at 125,000 Poincare francs, or approximately 8,300 United States dollars.[3] In exchange for the limitation, the Warsaw Convention, in Article 20, created a rebuttable presumption of air carrier liability unless "he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures." Article 25 then provided that, in cases where a plaintiff is able to

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[3] The actual amount was $8,291.87. Block v. Compagnie Nationale Air France, 386 F.2d 323, 325 (5th Cir. 1967). Article 22(4) of the Convention provides that "The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures."

prove "willful misconduct" the carrier will not be entitled to avail himself of the limitation on liability.

On July 31, 1934, the United States deposited its instrument of adherence to the Warsaw Convention in the archives of the Ministry of Foreign Affairs of Poland in accordance with the procedure set forth in Article 37 of the treaty. At the time the Senate ratified the treaty, notably during the time this country (and the world) was in the midst of the Great Depression, the $8,300 amount of the limitation was thought to provide some benefit to both passengers and carriers. Indeed, Secretary of State Cordell Hull transmitted the Warsaw Convention to the Senate with the following statements:

> It is believed that the principle of limitation will not only be beneficial to passengers and shippers as affording a more definite basis of recovery and as tending to lessen litigation, but that it will prove to be an aid in the development of international air transportation, as such limitation will afford the carrier a more definite and equitable basis on which to obtain insurance rates, with the probable result that there would eventually be a reduction of operating expenses for the carrier and advantages to travelers and shippers in the way of reduced transportation charges.

Senate Comm. on Foreign Relations, *Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules*, Sen. Exec. Doc. No. G, 73d Cong., 2d Sess. 3-4 (1934). Therefore, at the time of ratification, the principle and the amount of limitation were assented to by the United States. Since that time and especially with the growth of the air industry to its present proportions, the limitation has become an increasingly uncomfortable and unpopular proposition.

While the limitation was once accepted, it has constantly been the focus of debate and disagreement. The

United States, although adhering to the uniform rules relating to international transportation, has not been satisfied with the low limits placed on air carrier liability. As early as 1935, one year following United States adherence, there was discussion of possible amendment to the Convention. Lowenfeld & Mendelsohn at 502. As a result of the alarm expressed by the United States and other nations where full recovery for personal injury and wrongful death had become the rule, discussions and proposals for change continued until another conference met in September 1955. Convened this time at the Hague, the stated goal was to resolve the debate concerning whether the liability limits had been set at an appropriate level. Lowenfeld & Mendelsohn at 504. The Hague Conference, therefore, had a limited purpose with the intent being to retain uniformity in the rules and conditions expressed in the Warsaw Convention while resolving the dissatisfaction with the low limits of liability. S. SPEISER & C. KRAUSE, 1 *Aviation Tort Law* 670-74 (1978).

Through much negotiation and debate the Hague Protocol did, among other things, double the limitation to $16,600. Nonetheless, the outcome of the Hague conference failed to resolve the dissatisfaction; the United States never ratified the Hague Protocol. In fact, the amendments to Warsaw were never presented to the Senate for ratification, since even the increased limitation faced an unpleasant political climate. Lowenfeld & Mendelsohn at 515. The limitation amount therefore remained at $8,300 in this country.

Discontent continued for another decade. Then, in 1965, the United States determined that the Warsaw limitation could no longer be tolerated and decided to denounce the treaty. Deposited November 15, 1965 and in accordance with Article 39, set to become effective six months later, the State Department Press Release concerning the Notice of Denunciation stated that "the United States wishes to make clear that the action to denounce the Warsaw Con-

vention is taken *solely* because of the Convention's low limits of liability for injury or death to passengers, and in no way represents a departure from the longstanding commitment of the United States to the tradition of international cooperation in matters relating to civil aviation." 53 Dept. State Bull. 923, 924 (1965) (emphasis added). The Notice continued to state clearly that the threat of denunciation would be withdrawn if the limitation were raised, by special contract or otherwise, to preferably $100,000 but not less than $75,000.

The Montreal Agreement was adopted in response to the United States' decision to withdraw from the Warsaw Convention. Unlike the Hague Protocol, the Montreal Agreement did manage to calm the din of criticism of the low limits which had, by 1965, "reached a crescendo." S. SPEISER & C. KRAUSE at 674. In order to avert United States denunciation of the treaty, air carriers agreed to raise the limitation amount to $75,000 and to submit to virtual strict liability; the Montreal Agreement provides that an air carrier "shall not . . . avail itself of any defense under Article 20(1) of said Convention or said Convention as amended by [Hague] Protocol." In addition, the Agreement provided that the "Montreal Advice" would be printed in 10-point type and in ink contrasting with the ticket stock. However, the Montreal Agreement is completely silent with respect to sanctions to be imposed for failure to comply with any of its three provisions.

Contrary to the view that waiver of the limitation was contemplated, the Montreal Agreement was entered into to *preserve* the limitation. Intended only as an interim agreement until the treaty could be amended, the Montreal Agreement achieved a stand-off on the issue of the level of the limitation. By its very terms, the Agreement is only a "special contract" under the Warsaw Convention. It applies to "international transportation" as defined in Article 1(2) which includes a point in the United States as a point of origin, point of destination, or agreed stopping place. While leaving air carriers liable without

fault, the Agreement permits air carriers to avail themselves of the liability limitation found in Article 22(1); however, the amount of the limitation is increased to $75,000 and the defenses found in Article 20(1) have been waived.

Although the increase from $8,300 to $75,000 was significant, the fact remains that the United States will probably never be satisfied with any amount as a limit upon recovery. Therefore, while the debate has been phrased in terms of the "appropriate" level of the limitation, *see, e.g.*, Lowenfeld & Mendelsohn at 504, it is the very idea of any limit at all which has been and remains the problem. The United States has consistently rejected all limitation amounts; it certainly appears that "no convention with a limitation of damages can possibly pass the Senate of the United States." Kreindler, *A Plaintiff's View of Montreal*, 33 J. AIR L. & COM. 528, 529 (1967).

ISSUES PRESENTED

At issue is the interpretation of Article 3 of the Warsaw Convention which provides:

> (1) For the transportation of passengers the carriers must deliver a passenger ticket which shall contain the following particulars:
>
> (a) The place and date of issue;
>
> (b) The place of departure and of destination;
>
> (c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;
>
> (d) The name and address of the carrier or carriers;

(e) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. *Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.*

Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. § 1502 note (1982) (emphasis added).

Originally, Plaintiffs based their motion on a claim that the Montreal Agreement modified these provisions of the Convention so as to require air carriers to deliver to passengers embarking on "international transportation" tickets containing notice of the applicability of the Warsaw Convention in at least 10-point type size in order to limit their liability. It is Plaintiffs' position that the Montreal Agreement also "modified" the treaty provisions relating to the amount of the limitation, raising it from $8,300 to $75,000. Further, Plaintiffs argue that a carrier's failure to print the Montreal Advice in at least 10-point type constitutes "non-delivery" of a ticket under Article 3(2) and therefore triggers the treaty sanction—forfeiture of the limitation for air carrier liability.

In a subsequent pleading, Plaintiffs changed the focus of their argument from a claim that the Convention was modified in Montreal to a claim that the Warsaw Convention is not applicable at all because "Korean Air Lines, a corporate citizen of a nation not a party to the Warsaw Convention, has no standing to avail itself of

the defenses contained in the Warsaw Convention." Plaintiffs' Reply Brief at 3. This argument is based on the notion that there is no treaty relationship between the Republic of Korea and the United States and that, therefore, the Convention cannot apply to an air carrier incorporated in Korea. Plaintiffs contend that the absence of a treaty relationship with Korea, if indeed there is no such relationship, prevents Korean Air Lines from asserting the Warsaw Convention limitation on liability. However, if Plaintiffs are correct and the applicability of the Convention rests on the existence of reciprocal ratification by Korea and there has been no such ratification, then, not only would Korean Air Lines be precluded from claiming the limitation, the Court would be altogether precluded from exercising jurisdiction over the air carrier.

Korean Air Lines vigorously opposes the motion for partial summary judgment. Under either of the somewhat contradictory theories posited by Plaintiffs, Defendant claims that the Montreal Agreement, being an agreement between air carriers, not nations, cannot modify the Warsaw Convention to require or trigger the imposition of the treaty sanction of unlimited liability. Further, Korean Air Lines argues that the United States and the Republic of Korea do maintain a treaty relationship with respect to the Convention; consequently, Plaintiffs' second theory cannot be correct.

By challenging Korean Air Lines' statement that "the rights of the moving plaintiffs and defendant KAL are governed exclusively by the provisions of a treaty of the United States known as the Warsaw Convention," Plaintiffs' second theory impugns the jurisdiction of the Court. The challenge to "treaty jurisdiction" affects not only the actions filed by these Plaintiffs, but this entire multidistrict litigation. Therefore, the question concerning jurisdiction and the requirement of a treaty relationship with Korea must be examined before proceed-

ing to the issue of the applicability of the Warsaw Convention limitation on liability.

JURISDICTION UNDER THE WARSAW CONVENTION

Article 1(1) provides that "[t]his Convention shall apply to all international transportation of persons, baggage or goods performed by aircraft for hire." Article 17 of the Convention makes the carrier liable for the death or personal injury of passengers sustained while engaged in international transportation. Article 24 of the Convention further states that cases brought for damages sustained in the event of wounding of passengers "can only be brought subject to the conditions and limits set out in this convention"; Article 32 emphasizes this point by stating that the parties are prevented from "deciding the law to be applied" or "altering the rules as to jurisdiction." Therefore, nations which are parties to the Warsaw Convention have agreed that actions for wrongful death or personal injury occurring during "international transportation" will be governed by the rules of the Convention.

As a treaty of the United States and, therefore, the "supreme Law of the Land," U.S. Const. art. VI, the Warsaw Convention preempts other laws. Since the Warsaw Convention applies to "international transportation" and since the United States has agreed to this treaty, as "supreme Law of the Land" the Convention exclusively and specifically controls the recovery which plaintiffs seeking damages for wrongful death or personal injury occurring during "international transportation" may receive in American courts. *In re Air Crash Disaster at Warsaw, Poland on March 14, 1980*, 535 F. Supp. 833, 844-45 (E.D.N.Y. 1982), *aff'd*, 705 F.2d 85 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983). The Convention also governs the question of jurisdiction; therefore, the Court must look to the terms of the Convention to determine its applicability.

By its terms, the Warsaw Convention applies only to "international transportation," defined in Article 1(2) as

> any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention.

The four conditions specified in Article 28(1), *i.e.*, domicile of the carrier, principal place of business, place where the ticket was purchased or the place of destination, are generally thought to control jurisdiction once "international transportation" has been established. *See, e.g., Vergara v. Aeroflot "Soviet Airlines"*, 390 F. Supp. 1266; 1269 (D. Neb. 1975); *Smith v. Canadian Pacific Airways, Ltd.* 452 F.2d 798 (2d Cir. 1971); *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979). There being no genuine issue respecting either Article 1(2) or Article 28(1) for the tickets relevant to this motion there should be no question that the Warsaw Convention applies to these actions and that there is treaty jurisdiction in this Court. However, Plaintiffs raise the question of jurisdiction by contending that there is no treaty relationship between Korea and the United States as regards the Warsaw Convention and that the absence of a treaty relationship prevents the Court from exercising any of the Convention's provisions in favor of Defendant, Korean Air Lines, a corporate citizen of Korea. Instead, Plaintiffs would have the Court "enforce" the Montreal Agreement, as though it were a separate contract, without regard to the Warsaw Convention.

Plaintiffs' argument assumes "treaty jurisdiction" is not necessary to maintain these actions. That is incorrect. "If treaty jurisdiction under the Convention does not lie, federal jurisdiction under 28 U.S.C. § 1331(a), which permits cases *arising under* United States treaties, clearly cannot be established." *Smith v. Canadian Pacific Airways, Ltd.*, 452 F.2d at 802 (emphasis in original); *accord, In re Air Crash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301 (9th Cir. 1982). If Plaintiffs are correct, and there is no treaty jurisdiction because there is no treaty relationship, then there is no federal jurisdiction over the Defendant at all.

The Court rejects Plaintiffs' contention that there is no treaty relationship between the United States and Korea. Central to Plaintiffs' argument is the fact that the Republic of Korea adheres to the Protocol Amending the 1929 Convention for the Unification of Certain Rules Relating to International Carriage by Air (Hague Protocol), 478 U.N.T.S. 371 (1955) rather than to the Warsaw Convention. By distinguishing the Protocol from the Convention as though the two are independent treaties and by arguing that there is no treaty relationship between this nation and Korea, Plaintiffs ignore the development of the Warsaw system. Having considered the history of the Hague Protocol, the Court concludes that the Protocol cannot be considered separately from the Warsaw Convention; it consists of nothing more than a list of amendments to the original treaty. Indeed, the only difference between the titles of the Convention and the Protocol are the very words "Protocol to Amend." The very name of the Hague Protocol gives evidence that it was intended and, in fact, is merely the Warsaw Convention with certain alterations.

Knowing the history of the conference which produced the Hague Protocol and the reasons the United States negotiated and signed but never ratified the Hague Protocol provides a context for understanding the relationship of the United States to those countries which choose to adopt those amendments. First, since the Protocol came later than the Convention it essentially offered new nations a choice: adopt the Warsaw Convention as originally formulated in 1929 or adopt the amended version as formulated in 1955. The purpose of the Warsaw Convention was to unify the rules; the purpose of the Hague Protocol was merely to amend those same rules. Korea has chosen to adhere to the Hague Protocol and is therefore a High Contracting Party to the Warsaw Convention *through* those amendments. In fact, Article XXIII of the Hague Protocol states:

> Adherence to this Protocol by any State which is not a Party to the Convention shall have the effect of adherence to the Convention as amended by the Protocol.

Therefore, since July 13, 1967, Korea has adhered to the Warsaw Convention through its ratification of the Hague Protocol. At least with respect to the unamended portions of the Convention, the United States and Korea are parties to the same treaty.

Moreover, it would hardly encourage the goal of the Warsaw Convention to establish uniform rules, law and procedure for claims arising out of international aviation and then to complicate the application of those rules by requiring reciprocity in ratification. The delegates to the Hague Conference were well aware of this and deliberately adopted the negotiated amendments merely as a Protocol to amend Warsaw rather than as an entirely new convention specifically to retain uniformity. S. SPEISER & C. KRAUSE at 671-72. Plaintiffs' argument fails because "[t]he Convention is not concerned with reciprocal treatment of nationals; its purpose is to unify rules relating to international transportation by air." S. SPEISER & C. KRAUSE at 666.

The negotiations and events which led to the Montreal Agreement were themselves tied to the convention. Plaintiffs' argument that the Montreal Agreement may be considered without resort to the entire Warsaw system of recovery is untenable.

INTERPRETING THE WARSAW/MONTREAL LIMITATION OF LIABILITY

On the issue of maximum liability limits, there has been considerable debate and clash of ideology. Yet more than five decades of discussion have managed to produce no more than an uneasy truce on the issue. The level of the limitation has been tinkered with in hopes of making it more palatable. The United States has been able to force some concessions, principally in the nature of a "special contract"—the Montreal Intercarrier Agreement—increasing the limit for wounding, injury or death occurring during the international transportation of passengers involving a point of origin, point of destination or agreed stopping place in the United States; however, the United States remains unhappy with the concept of a limitation on damages.

While the increase from $8,300 to $75,000 brought about by the Montreal Agreement is certainly significant, evidence of continuing American dissatisfaction with *any* limit is found in the fact that the United States Senate has ratified no Convention, Protocol or Agreement since joining the original Convention. This is true even though the United States has been presented with at least three opportunities to join in treaty amendments to raise the limitation. First, there was the Hague Protocol, and then the proposed Guatemala Protocol.[4] The Guatemala Protocol is drafted so as not to become effective without United States ratification. Although these amendments

[4] Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, ICAO Doc. No. 8932 (1971), *reprinted in* A. Lowenfeld, Aviation Law Documents Supplement 975-84 (2d ed. 1981).

would have raised the limitation to $100,000, the United States Senate failed to ratify by the required two-thirds margin. The most recent amendments proposed to the Convention were drafted in Montreal. These amendments, known collectively as the Montreal Protocols,[5] would have provided for a maximum recovery of approximately $105,000; still the Senate failed to ratify. *See* 129 CONG. REC. S2237 (daily ed. March 7, 1983); 129 CONG. REC. S2279 (daily ed. March 8, 1983). Having rejected all proposals to date, it certainly seems that the United States is determined to accept no convention which imposes a limitation on the recovery available to citizens of this country. Therefore, while the debate has been couched in terms of the appropriate level of the limitation, it is the presence of a limitation at all that has been the real concern.

A. *Criticisms of the Treaty Limitation*

There have been two principal criticisms of the Convention's limitations. First, the limitations have been objected to on the ground that the reason for limiting liability in 1929 no longer exists today. In 1929, the limitation was adopted in order to promote a fledgling industry. "The international air giants of today were literally in their swaddling clothes." L. KREINDLER, 1 *Aviation Accident Law* 342 (1963) [hereinafter 1 *Aviation Accident Law*]. Then, the air industry was struggling to become truly international. Capital had yet to be invested and needed encouragement. It was hoped that the limitation on damages would attract capital and allow carriers to obtain insurance that might otherwise be discouraged by the threat of a single catastrophic accident. Lowenfeld & Mendelsohn at 499.

[5] Additional Protocol Nos. 1-4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, ICAO Nos. 9145-9148 (1975), *reprinted in* A. Lowenfeld, Aviation Law Documents Supplement 985-1001 (2d ed. 1981).

Today, however, the world of aviation is vastly different. In the fifty years since the Convention, air carriers have obtained both the necessary capital and insurance to allow the industry to grow to tremendous proportions. It is now the air industry, not individual members of society, which is best able to bear the burden of loss in cases of catastrophic accidents. Society, having accepted the burden of low recoveries during the industry's infancy, now feels that the risk of loss is better placed on what have grown to be major, mature corporations, often operating as world enterprises, instead of the individual victims. The consensus seems to be that "there is no longer any need to provide special protection to an industry which is capable of reimbursing customers for the damages it causes them." Comment, *The Growth of American Judicial Hostility to the Liability Limitations of the Warsaw Convention*, 48 J. AIR L. & COM. 805, 830 (1983). Moreover, it has been noted that domestic airlines managed to flourish without a similar limitation placed on liability. 1 *Aviation Accident Law* at 346.

The second, related, criticism of the treaty limitation has been that liability limitations are "an affront to the American ideal of full and adequate compensation to injured plaintiffs by those responsible for the harm." *Id.* American courts operate under the principle that "[i]t is absolutely basic and fundamental . . . that an injured person should be appropriately compensated for the loss he has sustained." KREINDLER, *supra*, 33 J. AIR L. & COM. at 530. Within our system of law, the imposition of a maximum recovery, without regard to the amount of damages which may be proven, is a significant deviation from traditional American tort law principles. *See* 1 *Aviation Accident Law* at 344-45.

The two major criticisms together, that a limitation on tort recovery is anathema to traditional American legal principles and that the air industry has long since

outgrown the need for special protection, combine for a forceful argument against continued application of the liability limits found in the Convention. "It is not insignificant to note however, that the original policy has lost a great deal of its persuasive force; air travel is no longer an infant industry." S. SPEISER & C. KRAUSE at 636-37. Nevertheless, the fact remains that the United States is a High Contracting Party to the Warsaw Convention, complete with treaty limitation. While this may be at variance with traditional tort law, as long as the political branches of our government choose to adhere to the Convention, the courts of the nation are obliged to enforce it as it was negotiated and written. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 273; (1984) (Stevens, J., dissenting).

B. *Interpretations of the Treaty Limitation*

It is well established that treaty interpretation involves a consideration of the history and intent of the contracting sovereigns. *Choctaw Nation v. United States*, 318 U.S. 423 (1943). Treaties are to be construed liberally but are not deemed to be abrogated or modified unless such intent has been clearly expressed. "Legislative silence is not sufficient to abrogate a treaty." *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. at 252. Further, the Warsaw Convention being a treaty of voluntary adhesion, should the political branches of our government determine that the treaty obligations have become more onerous than the foreign policy considerations justify, the treaty's provision for denunciation could be invoked again. For this reason, "[p]lainly, a party to a treaty of voluntary adhesion can have no need for the doctrine of *rebus sic stantibus* [changed circumstances], except insofar as it might wish to avoid the notice requirement [Article 39]." *Id.* at 253 n.24. If the adhering nations have no use of the doctrine, then clearly private parties such as these may not invoke the doctrine on their behalf. *Id.* at 253.

And yet American courts, faced with the prospect of enforcing a limitation which has become outmoded and contrary to domestic law, have taken avoidance of the treaty limitation upon themselves and have arrived at an interpretation of the Warsaw system which, in cases such as those presented by Plaintiffs here, eliminates the treaty limitation altogether. There are two provisions in the Warsaw Convention which, as a sanction, strip the limitation of liability from an air carrier. First, there is the "wilful misconduct" section, Article 25, which excepts from the limitation those cases in which a plaintiff can prove that the accident generating the action was caused by the carrier's "wilful misconduct," which is to be defined by the court of law to which the case is submitted. Since the plaintiff's burden under this provision is a heavy one, this Article provides little ground from which to attack the limitation.

Consequently, the majority of courts have addressed the issue through judicial interpretation of Article 3.* This provision has provided much space for judicial maneuverings and innovative interpretations. Specifically, Article 3(2) provides:

> The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall nonetheless be subject to the rules of this convention. Nevertheless, *if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.*

(Emphasis added.)

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* The limitation has been attacked on constitutional grounds as well *see, e.g.*, In re Aircrash in Bali, Indonesia on April 11, 1974, 684 F.2d 1301 (9th Cir. 1982); Burdell v. Canadian Pacific Airways, 10 Av. Cas. (CCH) 18,151 (Ill. Cir. Ct. 1968).

By providing for unlimited liability where there has been "nondelivery" of a passenger ticket, this Article of the Warsaw Convention has been given a construction, in conjunction with the Montreal Agreement, which eliminates the limitation for many plaintiffs.

1. "Adequate notice"

Construing the phrase "accept a passenger without a passenger ticket having been delivered" to include physically delivered tickets which fail to contain "adequate notice" of the Warsaw/Montreal limitation, courts have made a way for full recovery where there was none. In a line of cases beginning with *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965), through the most recently decided *In re Air Crash Disaster at Warsaw, Poland on March 14, 1980, supra*, increasing importance has been placed on the passenger's need to know that in the case of tragedy during international air travel his recovery will be severely limited. "Adequate notice," ordinarily thought of as a domestic legal concept, has been judicially written into the Convention, in order to give "substance" to the provision regarding passenger tickets.

Ironically, a dissenting view in *Lisi* may have been a premonition of the developments to come. Noting that "[t]he majority do not approve of the terms of the treaty and, therefore, by judicial fiat they rewrite it," *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508, 515 (2d Cir. 1966) (Moore, J., dissenting), *aff'd by equally divided court*, 390 U.S. 455 (1968), the dissent termed the court's action in what was a turning point in the law "judicial treatymaking." *Id.* Further, Judge Moore noted that "[w]ere actual notice to be the requirement, every airline would have to have its agents explain to every passenger the legal effect of the treaty and, in all probability, insist that each passenger be represented by counsel who would certify that he had explained the import of the Convention to his client who, in turn, both

understood and agreed to the limitation." *Id.* While it may be overstated, the hypothetical does drive home the point that preoccupation with the type size has less to do with "adequate notice" than with rejection of the limitation.

Although Article 3(1)(e) specifies that a passenger ticket shall contain "[a] statement that the transportation is subject to the rules relating to liability established by this convention," Article 3(2) says nothing regarding the "adequacy" of notice or any other particulars of the required statement. A literal reading of the provision would seem to indicate that the Convention is intended to apply regardless of whether or not the physical ticket is retained once it has been delivered into the possession of the passenger; certainly, there is no requirement that it be read by the passenger. Also, defects in the physical ticket are not to interfere with the enforceability of the liability rules. Indeed, inadequate notice through the statement could be considered an "irregularity" or defect in the pasenger ticket which "shall not affect the existence or the validity of the contract of transportation, which shall nonetheless be subject to the rules of this convention."

Nevertheless, in *Mertens v. Flying Tiger Line, Inc.*, the Second Circuit found that physical delivery of a ticket once the passenger has boarded the airplane is inadequate and constitutes "nondelivery" under Article 3(2). The court stated: "We read Article 3(2) to require that the ticket be delivered to the passenger in such a manner as to afford him a reasonable opportunity to take measures to protect himself against the limitation of liability. . . . The delivery requirement of Article 3(2) would make little sense if it could be satisfied by delivering the ticket to the passenger when the aircraft was several thousand feet in the air." 341 F.2d at 856-57. However, the situation presented to the *Mertens* court involved *physical* delivery of the passenger ticket. While it is not surprising that an American court would find it necessary that

notice, once required, be given "in such a manner as to afford [the passenger] a reasonable opportunity to take self-protective measures," a notice requirement is nowhere within the treaty nor is the Article 3(1)(e) statement linked with the limitation.

The definition of "adequate notice" found in *Mertens* was dependent upon the timing of the physical delivery of the ticket. The court found that the ticket containing notice must be delivered in circumstances allowing the passenger to obtain additional protection, if desired. Given that the *Mertens* court had decided that the limitation was such an alarming prospect for any passenger to face, it is not surprising that the standard for permitting the limitation to stand and for protecting the passenger against the limitation became strict notice of the limitation.

In *Warren v. Flying Tiger Line, Inc.*, 352 F.2d 494 (9th Cir. 1965), the court followed the reasoning in *Mertens* and held that the very inclusion of a requirement to provide a statement of the applicability of the Convention's limitation meant that "[t]he purpose of such a statement is to notify passengers of the applicability of the Convention, thus affording them an opportunity to take steps to protect against the limitation of liability." 352 F.2d at 497. The Ninth Circuit expanded the *Mertens* holding, stating that there is an "implied requirement of Article 3(2), that delivery of the passenger ticket be made sufficiently in advance of the flight so that the passenger may, if he desires, obtain additional insurance protection." 352 F.2d at 498.

Occurring before the Montreal Agreement became effective, and indeed, before the United States threatened denunciation of the Warsaw Convention, these cases did not rely on the nature or size of the print found on the passenger ticket. Nonetheless, the courts managed to sidestep the limitation and provide what is already proper under domestic law: full recovery to injured plaintiffs.

Then, almost immediately following these cases, again before the Montreal Agreement, focus began to be placed on the "adequacy of notice" as related to the print of the ticket. A landmark case, *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 253 F. Supp. 237 (S.D.N.Y.), *aff'd*, 370 F.2d 508 (2d Cir. 1966), *aff'd by equally divided court*, 390 U.S. 455 (1968), held that "compliance with the Convention requires not mere physical delivery of a ticket and check before departure but delivery of a ticket and check which notify the passenger that the provisions of the Convention which exclude or limit liability are applicable." 253 F. Supp. at 239 (footnote omitted). Having phrased the question with respect to Article 3(2) as one of "adequate notice," the lower court in *Lisi* went on to find that the notice of the applicability of the liability limitations was in fact inadequate because it was printed in "microscopic type," "camouflaged in Lilliputian print in a thicket of 'Conditions of Contract.'" 253 F. Supp. at 243. Further, the court found that the required statement was "ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting color, or anything else. The simple truth is that they are so artfully camouflaged that their presence is concealed." *Id.* In effect, then, the court found that even with advance physical delivery, without a properly legible statement of the limitation, there could be no delivery of the ticket. In this way, the court rewrote that provision in the Convention which states that failure to include the statement of limitation on liability *does* not affect the applicability of the Convention's rules. While the *Lisi* court may well have construed the diminutive statement as equivalent to no statement at all, it seems at least somewhat extreme to have equated this fact to non-delivery of the entire contract of carriage. Article 3(2) appears directed to the *entire* ticket, which is evidence that a contract has been formed, and appears much less concerned with notice of limitation on liability than American courts have imputed to the drafters of the treaty.

On appeal, the Second Circuit noted:

> The Convention's arbitrary limitations on liability—which have been severely and repeatedly criticized—are advantageous to the carrier. But the *quid pro quo* for this one-sided advantage is delivery to the passenger of a ticket and baggage check which give him notice that on the air trip he is about to take, the amount of recovery to him or his family in the event of a crash, is limited very substantially. Thus the passenger is given the opportunity to purchase additional flight insurance or to take such other steps for his self-protection as he sees fit.

370 F.2d at 512-13 (footnote omitted). Again, the court was concerned with giving the Convention meaning; this meant giving the passenger "notice" of the position he was placing himself in by traveling internationally by air. Moreover, it has generally been agreed that the *quid pro quo* for the limitation is, not notice, but liability without fault. Even at the Hague Conference, liability as determined under the "wilful misconduct" provision was linked to the attempts to raise the limitation. Lowenfeld & Mendelsohn at 505. There is no evidence that the treaty drafters and signatories intended "adequate notice" to affect the operation of the treaty limitation.

There is in fact evidence to the contrary. In *Ludecke v. Canadian Pacific Airlines, Ltd.*, 98 D.L.R.3d 52 (Can. 1979), *rev'g* 53 D.L.R.3d 636 (Que. C.A. 1974), *aff'g in part and rev'g in part*, 12 Av. Cas. (CCH) 17,191 (Que. Super. Ct. 1971), the reasoning which was developed in *Mertens*, *Warren* and *Lisi* was considered and rejected. In *Ludecke*, the Supreme Court of Canada found:

> [T]he words of art. 3(2) are plain and can admit of no misunderstanding. The absence, irregularity or loss of a passenger ticket will not affect the existence or the validity of the contract of carriage. The benefit of the limitation will be lost only where no ticket is delivered. The American cases referred to above

> which hold that delivery of a ticket with an irregularity, that is, a statement as required by art. 1(*e*) which is illegible, amounts to no delivery of a ticket, ignore this plain language and fail to give effect to a precise statement of the law. I am unable, however harsh and unreasonable I may consider the limitation, to adopt the American test.

98 D.L.R.3d at 57.

Given the history of discontent with the limitation, it seems that the decisions rendered in these cases were directed toward correcting what is admittedly an inequitable burden as presently borne between carriers and passengers. Instead of giving weight to the history of the Warsaw/Montreal system, the courts have managed to interpret an additional waiver provision into the treaty.

Following the acceptance of the Montreal Agreement and the United States withdrawal of its Notice of Denunciation, the courts have continued to view with disapproval the limitation on air carrier liability. Judicial circumvention of the treaty limitation has taken a slightly different direction upon United States acceptance of the Montreal Agreement. Instead of focusing upon the timing of physical delivery, as in *Warren* and *Mertens*, the *Lisi* concern with the statement, which is never referred to as "notice" in the Convention itself, and the size of the print, increasingly became the focal point for attack.

2. 10-point type size requirement

As early as 1963, before the Montreal Agreement, the Civil Aeronautics Board promulgated regulations for air carriers which required the statement of applicability of the limitation to be printed in at least 10-point modern type size on paper of contrasting color. *See* 14 C.F.R. § 221.175(a). In *Deutsche Lufthansa Aktiengesellschaft v. C.A.B.*, 479 F.2d 912 (D.C. Cir. 1973), this Circuit Court of Appeals rejected the petitioning air carrier's argument that promulgation of the C.A.B. regulation conflicted with the Warsaw Convention and exceeded the agency's authority. The Circuit Court first found that the terms of Article 3 do not preclude the addition of more specific requirements regarding the statement. Further, the Court found that "[t]he recent trend of appellate court decisions has been to accord substance to the protections that Article 3 of the Convention intended to provide airline passengers." 479 F.2d at 917. The Court continued to find that "[t]he passenger is to receive full and effective notice of any limitations of liability so that alternative protection may be obtained." *Id.* The *Deutsche Lufthansa* case first determined that the C.A.B. regulations are valid and do not contravene the purposes of the treaty; in making this finding the Circuit also accepted the *Lisi* holding that "unless adequate notice is accorded its passengers, the carrier will later be precluded from using the Convention to limit liability." *Id.* at 918. In dicta surrounding the challenge to the domestic regulation, this Circuit noted that compliance with the regulation will not only provide passengers with adequate notice of the limitations on liability imposed on them but will later enable the carrier to invoke the protection of Article 8(1)(e); however this Circuit did not and has not yet addressed the question of what constitutes "adequate notice."

Having gone beyond the question of whether notice is required by the treaty, the question of just what constitutes "adequate notice" was addressed by the Second Circuit In *In re Air Crash Disaster of Warsaw, Poland on March 14, 1980*, 705 F.2d 85 (2d Cir. 1983). Essentially, the Court accepted the premise that the statement *must* provide notice of the limitation in order for the limitation to apply. From this premise, the Court progressed to a determination of "adequate notice." The Second Circuit decided that the "bright line" for "adequacy of notice" should be drawn at the 10-point type requirement found in both the C.A.B. regulation and the

Montreal Agreement. Thus, the 10-point type requirement has been grafted onto the treaty as the next phase in the attempt to circumvent the treaty provision. *In re Air Crash Disaster at Warsaw, Poland, supra*, went so far as to construe the "special contract" that was the Montreal Agreement as part and parcel of the treaty, and indeed, to place that new, "modified" provision just where the courts wanted it to be.

Construing the Article in this way is intended to give it a meaning parallel to that found in American law, but does not accord the treaty provision the meaning evident from the negotiation and debate which led to its promulgation. Nothing in the Montreal Agreement requires that an air carrier provide the statement of liability limitation in 10-point type or lose the benefit of that limitation. Nothing in the debate or dissatisfaction with the limitation which led to the Montreal Agreement confirms the contention that "adequate notice" was an issue. At the core of the debate is dissatisfaction with the very existence of the limitation; the erosion of the circumstances in which carriers may avail themselves of that limitation is the result of judicial frustration at the fact that courts are prevented from fully compensating plaintiffs, especially victims of air tragedies such as presented in this case. This disturbing feature of the treaty has not been eradicated through political process.

While American courts may be justifiably frustrated with the anachronism which the treaty limitation has become, it is not within the province of the judiciary to alter the *quid pro quo* agreed to by the political branches. It has been generally understood that in exchange for virtual strict liability against air carriers, international passengers are limited in their recovery. The "special contract" known as the Montreal Agreement supplemented the *quid pro quo* by raising the amount of the limitation and waiving the carriers' defenses under Article 20 leaving only the presumption of liability. It also

supplemented the Article 3 requirements that a statement be included in the passenger ticket by providing specifics to be provided by carriers stopping in the United States; it did not alter the *quid pro quo* by linking Articles 22 and 20 with Article 3.

In any case, the political branches are vested with the power and authority to make express their intent regarding the enforceability of the treaty limitations in cases where the C.A.B. regulation and Montreal Agreement directive for 10-point type has been violated. However, the United States must be explicit if it is its intent to abrogate the obligation to enforce the treaty limitation in cases such as these Plaintiffs present. The Court notes that were the violation of the regulation for 10-point type and the carrier agreement indeed crucial, a more appropriate sanction would be to prohibit the recalcitrant carriers from engaging in air transportation to or from the United States. While the Government does not have the unilateral power or authority to be rid of the treaty limitation altogether (even the earlier threat of denunciation by the largest participant in international aviation could not accomplish this) the Government could suspend the operating permits of those carriers who do not abide by our domestic laws and regulations. 49 U.S.C. § 1372. The 10-point type size regulation is such a domestic requirement. While the carriers agreed to it in the Montreal Agreement as well, the foreign air carriers are *not* the contracting parties to the treaty. Therefore, Plaintiffs' argument that this carrier was on notice that it would be stripped of limited liability for failing to provide "adequate notice" must fail. While it is indeed correct that the Montreal Agreement must be read in connection with the Warsaw Convention, the resulting Warsaw Montreal system does not include delimiting liability for failure to provide the statement in 10-point type size. In short, the Montreal Agreement may not be read wholesale into the Warsaw Convention.

Although Plaintiffs derive their argument linking the treaty sanction to the statement from case precedent, the basic flaw in their argument is the assumption that the Montreal Agreement can operate as an amendment to the Warsaw Convention; it cannot. Under the Convention's provisions, the carrier and the passenger may agree to a higher limit of liability. While the limit may be raised, nothing in the "special contract" provision allows it to be completely removed. There is nothing in the "special contract" provision which allows the carrier to waive its defenses under Article 20. However, an express, written agreement to waive those defenses, which the Montreal Agreement contains, should be honored by the courts. Waiver by express agreement is not claimed by these Plaintiffs. Defendant Korean Air Lines, having agreed to the Montreal Agreement, has come forward to make an express denial of waiver in these circumstances. Were the Court faced with a clear, political decision to avoid the treaty limitation where there has not been "adequate notice," however defined, or were it faced with an express waiver, as with the Article 20 defenses, then a different decision would be possible.

Putting aside for the moment the question of whether the Montreal Agreement may amend the treaty, the principal concern in adopting the Agreement was the United States' threat to withdraw from the Convention; notice of the limitation's operation was *not* an issue. Where the political branches have been stymied, "judicial treatymaking" to include notice has proved irresistible to some courts. In the view of this Court, treaty revision is not the right or responsibility of the judicial branch. Moreover, the Executive Branch has recognized the continued vitality of the Warsaw Convention. In its *amicus curiae* brief in the *Franklin Mint* case, the United States cautioned against rendering the treaty limitation entirely unenforceable. While not addressing the exact question which faces this Court, the Government brief noted that "The United States remains committed to the

Convention as the basic instrument governing questions of liability in the international aviation industry." *Amicus Curiae* Brief of the United States at 2. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1984). As the Supreme Court noted in its decision in the case, "when the parties to a treaty continue to assert its vitality a private person who finds the continued existence of the treaty inconvenient may not invoke the doctrine on their behalf." *Id.* at 253. Since the branches of Government vested by the Constitution with the power to make and break treaty obligations continue to assert the utility of the Convention, and to assert the enforceability of the treaty limitation, these private citizens may not, indeed the Court may not, define the treaty limitation out of existence, even in narrow circumstances. That task, difficult though it has proven to be, has been assigned to the legislative and executive branches of our Government.

3. Immediate payment of $75,000

In addition to seeking unlimited liability against Korean Air Lines, Plaintiffs have requested an immediate payment of $75,000 as partial damages. Plaintiffs misconceive the nature of the limitation. The $75,000 limitation on air carrier liability is a maximum, not a minimum, on the amount of damages which a plaintiff may receive, *once he has proven his damages*. While the Montreal Agreement subjects air carriers to virtual strict liability, air carriers are not automatically liable for an amount of $75,000. The limitation does not operate as would insurance; Plaintiffs are still required to prove the amount of their damages and are entitled to receive only the amount which they can prove.

Moreover, the nature and amount of unliquidated damages cannot be proved in a motion for summary judgment. Since the amount of damages must be established on an individual basis, there are still material issues of

fact which remain to be tried. Defendant cannot be precluded from conducting discovery with which to defend against Plaintiffs' claims. There being material issues of fact with respect to the amount of individual damages, it would be entirely inappropriate to award the maximum damages. The request for immediate payment of $75,000 must be denied.

CONCLUSION

"Judicial predilection for their own views as to limitation of liability should not prevail over the limitations fixed by the legislative and executive branches of Government even though this result is obtained by ostensibly adding to the treaty a requirement of actual understanding notice." *Lisi v. Alitalia-Linee Aeree Italiane*, S.p.A., 370 F.2d at 515 (Moore, J., dissenting). The Montreal Agreement is not a negotiated amendment to the Warsaw Convention. Even if the Agreement could rise to the level of an amendment to the treaty, which it cannot, the principle of law requiring clear expression of the intent of the political branches would prevent a finding that the treaty is to be abrogated. Plaintiffs' construction is not supported by the negotiating history of the Warsaw/Montreal system.

It may be arguable that American courts have been justified in arriving at the conclusion that the Montreal Agreement affects the application of the treaty sanction since the Agreement applies only to transportation including the United States; however, such an interpretation rejects the fact of the clear intransigence of a majority of High Contracting Parties to the Convention with regard to delimiting carrier liability. There is every indication that the majority of the more than 120 nations adhering to the Convention intend to continue the special protection afforded international carriers, even at the expense of international passengers. In light of this intransigence, it is especially inappropriate for the Court to

interpret the treaty provisions in such a way as to relieve the United States of its treaty obligations. In addition, the Montreal Agreement contains no expression of the carriers' intent to waive the limitation. In fact, it makes no mention at all of the sanction to be imposed for a carrier's failure to include proper notice to passengers. Making tolerable an intolerable treaty provision is simply not the province of the courts. Therefore, for the foregoing reasons, the motion for partial summary judgment against Korean Air Lines shall be DENIED.

An appropriate Order accompanies this Memorandum.

/s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
Chief Judge

DATE: July 25, 1985

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL No. 565
Misc. Docket No. 83-0345

IN RE: KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1983

Civil Action Nos. 83-2793,
83-2941, 83-3154, 83-3177,
83-3204, 83-3441, 83-3445,
83-3448, 83-3449, 83-3450,
83-3451, 83-3452, 83-3453,
83-3454, 83-3455, 83-3456,
83-3457, 83-3458, 83-3459,
83-3460, 83-3461, 83-3462,
83-3463, 83-3464, 83-3465,
83-3466, 83-3467, 83-3468,
83-3469, 83-3470, 83-3473,
83-3474, 83-3587, 83-3588,
83-3792, 83-3793, 83-3889,
83-3891, 83-3898, 83-3901,
83-3902, 83-3903; 84-0029,
84-0030, 84-0402

ORDER

In accordance with the Memorandum entered this date, it is by the Court this 25th day of July, 1985,

ORDERED, that Plaintiffs' Motion for Partial Summary Judgment Against Defendant Korean Air Lines Co., Ltd. is DENIED; and it is

FURTHER ORDERED, that Korean Air Lines Co., Ltd., is entitled to avail itself of the limitation on dam-

ages provided by the Warsaw Convention and raised to $75,000 by the Montreal Agreement; and it is

FURTHER ORDERED, that Plaintiffs may not receive immediate payment of $75,000, there being material issues of fact with respect to the amount of unliquidated damages.

/s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
Chief Judge

D.H. GINSBURG, *Circuit Judge, concurring*: I join in the court's opinion and add some reflections on the "choice of law" problem in the context of a federal claim transferred under 28 U.S.C. § 1407 from courts in various circuits to a court in another circuit. I write separately to emphasize the practical problems inherent in any resolution of this problem under the statute as written, and to surface preliminarily some ameliorative steps open only to Congress.

I. CONGRESSIONAL INTENT IN SECTION 1407(a)

The problem is simply enough stated. The Second Circuit takes one view of the relevant federal law, this court takes another, and still other circuits have not addressed the question. Cases filed in district courts in the Second Circuit, in this circuit, and in other circuits were consolidated in the district court here for pretrial proceedings under § 1407. On a motion for summary judgment as to all the cases, which view of the applicable federal law is the district court to apply to the cases filed outside this circuit? The New York plaintiffs in this case contend that, under *Van Dusen v. Barrack*,[1] the transferee district court must apply the Second Circuit's interpretation to the cases filed originally in that venue. The court rejects that argument because the *Erie* policies underlying *Van Dusen* do not extend beyond the sta law context of that case.[2] I agree.

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[1] 376 U.S. 612 (1964).

[2] Opinion of the Court, *supra*, at 7. Plaintiffs cite several authorities for the proposition that *Van Dusen* requires a transferee court under section 1407 to apply the case law of the transferor circuit to a transferred case. Plaintiffs' Brief at 7. *See Berry Petroleum v. Adams & Peck*, 518 F.2d 402, 408 n.7 (2d Cir. 1975) ("Since this case was brought in a district court in the Fifth Circuit, the substantive law of that circuit is the law we must consider here."); *In re National Student Marketing Litigation*, 517 F.Supp. 1345, 1346 n.3 (D.D.C. 1981); *In re Haven Industries*, 462 F.2d 172, 179

Quite apart from whether *Van Dusen* is controlling, there are some circumstances in which a federal court is bound to apply the decisions of another circuit, but

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(S.D.N.Y. 1978); *Stirling v. Chemical Bank*, 382 F.Supp. 1146, 1150 n.5 (S.D.N.Y. 1974), *aff'd* 516 F.2d 1396 (2d Cir. 1975); *In re Four Seasons Securities Laws Litigation*, 370 F.Supp. 219, 228 (W.D.Okl. 1974); *In re Plumbing Fixtures Litigation*, 342 F.Supp. 756, 758 (Jud.Pan.Mult.Lit. 1972); *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 309 F.Supp. 1053, 1055 (E.D.Pa. 1969).

The cursory "analysis" employed in the cases amounts to the following. In *Philadelphia Housing Authority*, the parties did not dispute the proposition, and the court cited *Van Dusen* as authority. The issue was disputed in *Plumbing Fixtures*, but the court relied upon *Van Dusen* and *Philadelphia Housing Authority* without analysis. *National Student Marketing*, *Four Seasons*, and *Stirling v. Chemical Bank* merely bootstrapped on *Plumbing Fixtures*, while *Haven Industries* cited *Plumbing Fixtures* as well as the Second Circuit's decision in *Berry Petroleum* (the only court of appeals decision favorable to the New York plaintiffs) which itself cited both *Plumbing Fixtures* and *Van Dusen* without discussion. That these cases fail to acknowledge the differences between the application of state and federal law was also pointed out *In re Pittsburgh & L.E.R. Co. Securities & Antitrust Litigation*, 543 F.2d 1058, 1065 n.19 (3rd Cir. 1976), which particularly undermines the value of *Philadelphia Housing Authority* as precedent on this point. *Berry Petroleum* is also questionable because it fails to address two prior decisions of the Second Circuit that are in direct conflict with it. *See H.L. Green Co. v. MacMahon*, 312 F.2d 650 (1962), *cert. denied*, 372 U.S. 928 (1963); *Ackert v. Bryan*, 299 F.2d 65, 69-70 (1962); *see also Clayton v. Warlick*, 232 F.2d 699, 706 (4th Cir. 1956); *Scheinbart v. Certain-Teed Products Corp.*, 367 F.Supp. 707 (S.D.N.Y. 1973).

Two other cited cases, *In re Air Crash Disaster at Boston, Massachusetts on July 31, 1973*, 399 F.Supp. 1106, 1108 (D. Mass. 1975); *In re Air Crash Disaster Near Hanover, New Hampshire*, 314 F.Supp. 62, 63 (Jud.Pan.Mult.Lit. 1970), are inapposite here; like *Van Dusen*, they involved the issue of which *state* law to apply. *See also In re Nucorp Energy Securities Litigation*, 772 F.2d 1486, 1491-92 (9th Cir. 1985);

they are the rare instances where a preclusion doctrine so requires. The doctrines of *res judicata*, collateral estoppel, and law of the case come to mind. The New York plaintiffs do not, and cannot, however, rely upon any of these doctrines to support application of *Polish Airlines* to their transferred cases.

Consequently, the New York plaintiffs' suggestion that transfer under section 1407(a) presents the type of exceptional circumstance that justifies imposing upon a federal court the duty to accept as binding another circuit's interpretation of federal law would constitute a novel departure from the norm of independent judgment. If Congress had intended such a departure, therefore, we should expect to find language in section 1407(a) that mandates, or at least suggests, it. Obviously, Congress could have directed transferee courts to apply the case law of the transferor court. Less directly, Congress could have suggested this practice by transforming the transferee judge into a temporary judge of each transferor court for the purposes of deciding the transferred cases.[5]

In re Eastern Airlines, Inc., Engine Failure, Miami International Airport on May 5, 1983, 629 F.Supp. 307, 315-16 (S.D.Fla. 1986). Judge Weigel cited the federal and state law cases together as supporting the proposition that "the transferee court must apply the substantive law of the transferor forum." Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 584 (1978). *See also* Manual for Complex Litigation, Second § 31.122 at 254 n.25 (1985) ("The transferee judge is bound . . . by the law that would apply in the transferor court, even if the case is later transferred to the transferee court under 28 U.S.C. § 1404").

[5] Congress took this type of approach in Section 1407(b) in apparent recognition that transferee judges, because they often preside over cases from far-flung transferor courts, would of necessity have to perform in unfamiliar roles. In section 1407(b), Congress authorized transferee judges to

We find no such language in section 1407(a), however.[4] Instead, the transfer scheme contemplates that a transferee court will adjudicate transferred cases no differently than cases originally filed before it. This is apparent throughout the scheme, from the point of transfer to the final disposition of the case. Rather than confine the transferee judge merely to presiding over the pretrial phase of cases that may be resolved finally in the transferor courts, section 1407(a) transfers jurisdiction over whole cases to the transferee court; upon transfer, the transferor courts retain no jurisdiction whatsoever.[6]

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order pretrial depositions outside of their normal jurisdiction. As we determined *In re Corrugated Container Antitrust Litigation*, 662 F.2d 875, 880-881 (D.C. Cir. 1981), however, it did so by making the transferee judge, for that purpose, a "temporary judge" of the district court for the district in which the deposition is taken. Congress seemingly could have drafted section 1407(a) also to transform the transferee judge into a judge of each transferor court for purposes of deciding the cases transferred from that court. (Such an approach would still preserve the efficiencies of requiring only one federal judge to become versed in the facts of a controversy.) If Congress also provided for transferor circuit review of such cases, then we might conclude that Congress' intent under such a version of section 1407(a) was for the case law of the transferor court to govern the transferred case.

[4] Section 1407(a) was enacted in 1968, and its legislative history indicates that *Van Dusen*, decided four years earlier, would apply in the pretrial context. *See* Opinion for the Court, *supra*, at n.5. There is no indication, however, that Congress believed that *Van Dusen* extended beyond its own context of federal courts applying state law.

[6] *See Glasstech, Inc. v. AB Kyro OY*, 769 F.2d 1574 (Fed. Cir. 1985); *Astarte Shipping v. Allied Steel & Export Service*, 767 F.2d 86, 87 (5th Cir. 1985); *In re Upjohn Co. Antibiotic Cleocin Products Liability Litigation*, 664 F.2d 114, 118 (6th Cir. 1981); *General Elec. Co. v. Byrne*, 611 F.2d 670, 673 (7th Cir. 1979); *In re FMC Corp. Patent Litigation*, 422 F.Supp. 1163, 1165 (Jud.Pa.Mult.Lit. 1976). *Cf. Starnes v. McGuire*, 512 F.2d 918, 924 (D.C. Cir. 1974) (en banc) (transfer under section 1404(a)).

Indeed, Congress contemplated that transferred cases might never return to the transferor courts, but instead might be settled or resolved by summary judgment in the transferee court,[6] or else transferred under section 1404(a) to that same transferee court for joint trial.[7] In practice, the vast majority of transferred cases are so resolved, and do not return to the transferor courts.[8] Finally, during the period of the 1407(a) transfer, any appeals—interlocutory or after summary judgment—go to the court of appeals for the transferee court, not to the courts of appeals for the transferor circuits.[9] I can

[6] *See* Weigel, *supra* note 2, 78 F.R.D. at 582-83; *Pfizer Inc. v. International Rectifier Inc.*, 538 F.2d 180 (8th Cir.), *cert. denied*, 429 U.S. 1040 (1976); *Humphreys v. Tann*, 487 F.2d 666, 668 (6th Cir. 1973), *cert. denied*, 416 U.S. 966 (1974); *In re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973), *cert. denied sub nom. Standard Oil Co. v. Alaska*, 415 U.S. 919 (1974); *Reidinger v. Trans World Airlines, Inc.*, 463 F.2d 1017, 1018 n.2 (6th Cir. 1972).

[7] *See, e.g., In re Air Crash Disaster at John F. Kennedy International Airport on June 24, 1975*, 479 F.Supp. 1118, 1121-22 (E.D.N.Y. 1978), and cases cited; *In re Yarn Processing Patent Validity Litigation*, 472 F.Supp. 174 (S.D.Fla. 1979); *In re Antibiotic Actions*, 333 F.Supp. 299 (S.D.N.Y. 1971).

[8] *See* Weigel, *supra* note 2, 78 F.R.D. at 583, which reports that less than 5 percent of transferred cases return to the transferor courts. More recent statistics indicate that the number may now approximate 25 percent. *See* 1986 Ann.Rep. Director Admin.Off. U.S. Courts 128; Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U.Pa.L.Rev. 595, 700 (1987).

[9] *See Corrugated Container*, 662 F.2d at 88; *Glasstech, Inc. v. AB Kyro OY*, 769 F.2d at 1576-78; *Astarte Shipping v. Allied Steel & Export Service*, 767 F.2d at 87. In a number of other decisions, *see, e.g., Gulf Oil Co. v. Copp Paving Co.*, 419 U.S. 186 (1974), as well as the cases cited *supra* note 6, the authority of the transferee circuit to review a transferee district court's order was assumed *sub silentio*.

see no indication, from the outline of this scheme, that Congress intended for transferee courts to apply to each transferred case the case law of the transferor court, nor any reason why it would so intend.

Before concluding, based on the lack of any evidence to the contrary, that Congress did not intend transferee federal courts to depart from the norm of independent judgment on matters of federal law, one final inquiry is necessary. For we should still hesitate to adhere to that norm if doing so would, for some other reason, frustrate the purpose of section 1407(a) "to promote the just and efficient conduct" of multidistrict actions, and part by "eliminat[ing] the potential for conflicting contemporaneous pretrial rulings by coordinate district and appellate courts."[10]

In order to discern whether the norm of independent judgment would have this result, we may assess its operation in the instant case. To recapitulate the procedural facts a bit, cases from district courts in the First, Second, and Sixth Circuits were transferred to the District Court for the District of Columbia for pretrial proceedings to be conducted jointly with cases filed here. KAL then filed a motion for summary judgment on the issue of damages, arguing that the Warsaw Convention imposed a maximum no-fault liability of $75,000 per passenger. When the motion was filed, only the Second Circuit had spoken on the pertinent question, holding in *Polish Airlines*[11] that an airline that does not give passengers tickets with 10-point type loses the protection

[10] *In re Plumbing Fixtures Cases*, 298 F.Supp. 484, 491-92 (Jud.Pan.Mult.Lit. 1968).

[11] *In re Air Crash Disaster at Warsaw Poland*, 705 F.2d 85 (2d Cir.), *cert. denied sub nom. Polskie Linie Lotnicze v. Robles*, 464 U.S. 845, *reh. denied*, 464 U.S. 978 (1983), *subsequent proceedings*, 748 F.2d 94 (2d Cir. 1984), on appeal after remand, *Harris v. Polskie Linie Lotnicze*, No. 86-2323 slip op. (9th Cir. June 22, 1987).

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of the damage ceiling. The other circuits, in particular the District of Columbia, First, and Sixth Circuits, had not yet addressed the issue.[12] Analyzing the Convention for himself, Chief Judge Robinson concluded that *Polish Airlines* was wrongly decided: noncompliance with the "10-point type" rule does not remove the ceiling.

Adhering to the norm of independent judgment, Chief Judge Robinson also determined that his ruling should apply to all of the cases before him, not only to those originally filed here. At least in the first instance, such uniform application of his ruling furthers considerably the efficiency and consistency goals of section 1407(a). All the cases will be governed by one rule as to damages, and they will all proceed in a like direction, rather than being bifurcated into two groups of cases with diverging litigation paths.

The only problem that does seem potentially to arise from this approach involves the eventual appellate review of Chief Judge Robinson's ruling on the Convention. Assuming for the purposes of illustration that interlocutory appeal to this court had not been granted and, furthermore, that the cases would not subsequently terminate for one or another reason in this circuit, then the transferred cases would return to the respective transferor courts for trial. The several courts of appeals, either on interlocutory appeal or on appeal of the final judgment, would in all probability review the course of pretrial proceedings, including Chief Judge Robinson's potentially outcome-determinative ruling on the Conven-

[12] Subsequent to the district court's grant of summary judgment in this case, the Fifth Circuit adopted the *Polish Airlines* rule. *See In re Air Crash Near New Orleans, Louisiana*, 789 F.2d 1092, 1098, *vacated*, 795 F.2d 381 (1986), *aff'd in relevant part*, 821 F.2d 1147 (1987) (*en banc*). As the district court's opinion in this case was not then published, however, the Fifth Circuit discussed only the Second Circuit's decision.

tion. Reversal would be most likely to occur, of course, in the Second Circuit, where his ruling would conflict directly with *Polish Airlines*.

Since this court would still review the cases filed in the District of Columbia, and as confirmed by the court today we do not agree with the *Polish Airlines* decision, the results on appeal would lead to two (or depending upon the views of the First and Sixth Circuits, perhaps more) different holdings on a determinative issue of damages.[13] A series of inconsistent appellate judgments is not a desirable outcome, however, particularly since the result in some cases might be to require renewed pretrial or trial proceedings. This whole course of case development, starting with divergent paths of appeal and ending with either conflicting or duplicative results, would clearly frustrate the primary goals of section 1407(a) "to promote the just and efficient conduct" of multidistrict actions.

Having a transferee court apply the norm of independent judgment in ruling on transferred cases, therefore, does pose some risk of undermining on appeal the interests served by section 1407(a). The question is therefore whether this potential risk is great enough to frustrate Congress' remedial intent in enacting section 1407(a), and thereby to persuade us that transferee courts must abandon the norm of independent judgment in deciding transferred cases. In this regard, I believe that, although there is some risk of cases unraveling upon review by transferor circuits, it is not significant. First, relatively few cases ever return to the transferor courts.[14] Second, most transferee court rulings will not be outcome-deter-

[13] In other situations, the disputed issue may involve liability.

[14] *See supra* note 8. Of course, fewer cases would be settled and more would return to their transferor courts if the other circuits show themselves ready to reverse transferee courts' pretrial rulings, thus inviting such encore appearances.

minative, but instead will involve routine matters, such as discovery orders, that will not provide grounds for a transferor circuit court to reverse a pretrial ruling by the transferee district court.

Third, as to those few outcome-determinative rulings of the transferee district court, there exists the possibility of interlocutory appeal to the transferee court, pursuant to 28 U.S.C. 1292(b), as indeed occurred in this case. If the transferee circuit reviews such a ruling, it of course would also exercise independent judgment and apply its own precedents rather than those of the transferor circuits. By reviewing the ruling, the transferee circuit probably will have insured that, if the cases are retransfered to the transferor courts, they will not unravel on later appeal. That is because, in contrast to the rulings of the district court under review, the interlocutory decisions of a coordinate court of appeals are likely to be accepted as binding, under the doctrine of law of the case, in the courts of appeals reviewing the final decision of the district court.[15] I therefore believe

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[15] No decision of this court has directly resolved the question of how courts should apply the law of the case doctrine after a case is transferred back to a transferor court. *See Int'l Union, UAW v. Donovan*, 756 F.2d 162, 165 n.16 (D.C. Cir. 1985); *Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071, 1082-83 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1181 (1985); *McCandless v. Beech Aircraft Co.*, 697 F.2d 1156 (D.C. Cir. 1983). Our precedents do suggest, however, that the transferor circuit should not disturb the transferee circuit ruling. In *Laffey*, we held that the law of the case doctrine precludes—absent clear error or manifest injustice—our reviewing, on appeal from a final judgment, a previous ruling of this court rendered on interlocutory appeal. The next question is whether the fact of transfer, and the resulting lack of identity of the two appellate courts, would alter our conclusion that an interlocutory appellate ruling is law of the case for the purpose of a subsequent appeal. *Donovan* would seem to reject this possibility by holding that, in the context of a transfer for lack of jurisdiction, the transferee court should not reexamine

that if (1) transferee circuits are receptive to interlocutory appeals involving outcome-determinative rulings by a transferee district court—again, as occurred in this

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the ruling of a transferor court of *coordinate* jurisdiction absent exceptional circumstances. In fact, this principle has been stated by other circuits. *See Kori Corp. v. Wilco Marsh Buggies & Draglines, Inc.*, 761 F.2d 649, 657 (Fed. Cir.), *cert. denied*, 106 S.Ct. 230 (1985); *Central Soya Co., Inc. v. Geo. A. Hormel & Co.*, 723 F.2d 1573, 1580 (Fed. Cir. 1983); *Hayman Cash Register Co. v. Sarokin*, 669 F.2d 162, 169 (3rd Cir. 1982); *Skil Corp. v. Millers Falls Co.*, 541 F.2d 554, 558 (6th Cir.), *cert. denied*, 429 U.S. 1029 (1976). *See also Sentner v. Amtrak*, 540 F.Supp. 557, 558-59 n.3 (D.N.J. 1982); Steinman, *supra note* 73, 135 U.Pa.L.Rev. at 702-03 & n.417; Weigel, *supra* note 5, 78 F.R.D. at 577.

While a transferor court of appeals might disagree with the transferee circuit's reading of the law, there is good reason in this context to accept a reasoned opinion as presenting something less than the clear error or exceptional circumstance that warrant departing from the law of the case doctrine. Chief Judge Robinson well put the case for transferor courts giving preclusive effect to rulings of a transferee court: "if transferor courts were free to readjudicate issues determined by transferee courts, transfers pursuant to 28 U.S.C. § 1407 could become meaningless exercises perpetuating the very duplication they were designed to eliminate." *In re Korean Air Lines Disaster of September 1, 1983*, MDL 565, Civ. No. 83-0345, Order on Remand at 5 (May 7, 1987).

See also In re Multi-Piece Rim Products Liability Litigation, 653 F.2d 671, 678 (D.C. Cir. 1981) ("Proper coordination of complex litigation may be frustrated if other courts do not follow the lead of the transferee court."). *Multi-Piece Rim Products* did not directly address the situation discussed in the text. Instead, it involved whether a pre-transfer order of a transferor district court had preclusive effect, as law of the case, on a transferee district court. *Cf. Blaski v. Hoffman*, 260 F.2d 317, 322 (7th Cir. 1958), *aff'd*, 363 U.S. 335 (1960) (the transferee Seventh Circuit refused to abide by the "erroneous" jurisdictional ruling of the transferor Fifth Circuit; the Supreme Court adopted the Seventh Circuit's view of the merits, but the law of the case issue was not raised to the court, although in *dictum* it suggested that, because the ruling involved the Seventh Circuit's jurisdiction, it would

case as well as in *Polish Airlines*[16]; and if (2) transferor circuits are receptive, on appeal after retransfer, to the law of the case as it was decided in the transferee circuit court, then even a continuing disagreement between the transferee and transferor circuits on the certified issue need not cause particular cases in a multidistrict litigation to come unglued.

As a result, any harm to the interests Congress meant to further in section 1407(a) will be limited to those outcome-determinative rulings of a transferee district court that are not the subject of an interlocutory appeal in the transferee circuit, and, assuming that the cases are transferred back to the transferor courts, result in reversals by one or more transferor circuit courts.[17] Whether this harm, which seems likely to be insignificant, is nevertheless great enough that transferee district courts must abandon the norm of independent judgment,

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not be bound by the Fifth Circuit's ruling on that point, 363 U.S. at 340 & n.9); *In re Upjohn Co. Antibiotic Cleocin Products Liability Litigation*, 664 F.2d 114, at 118-20 (6th Cir. 1981); *In re Long Distance Telecommunication Litigation*, 612 F.Supp. 892, 900-03 (E.D.Mich. 1985).

[16] *Polish Airlines*, 705 F.2d at 86 n.2 (a second interlocutory appeal followed—*see* 748 F.2d at 94-95). *See Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. at 192; *In re Western Liquid Asphalt Cases*, 487 F.2d at 192-93; *In re Air Disaster at John F. Kennedy International Airport*, 479 F.Supp. at 1124-29, and cases there cited.

[17] This harm would be further minimized if transferor circuit courts required, as a condition of reviewing a ruling by the transferee district court, that the appellant at least have sought interlocutory appellate review of that ruling while in the transferee circuit. This rule is comparable to that under which an appellate court will decline to reach an issue not raised before the trial court, *see District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1084-85 (D.C. Cir. 1984), and the institutional interests served are similar. In each instance, the rule requires the litigant to raise an issue at a particular stage in the litigation in order to prevent the litigant from, in

depends upon the probable effects of the alternative rule, under which the transferee district court would apply what it believes would be the interpretations of the respective transferor courts.[18] Again, the facts of this case are illustrative.

Under that alternative, Chief Judge Robinson, having determined that KAL's issuance of 8-point type tickets did not remove the limitation on damages provided under the Convention, would then have to determine the scope of his ruling. Certainly it would govern the cases filed in this district originally; no one disputes that proposition. Under the New York plaintiffs' argument, however, the ruling should not govern their cases, because *Polish Airlines* clearly dictates the contrary interpretation of the Convention.

When applied only to the District of Columbia and New York cases, adherence to the case law of the transferor circuit would be a fairly easy procedure for the transferee district court. It is almost a certainty, however, that the bifurcated ruling it produces would place the District of Columbia and New York cases on increas-

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effect, confronting the court on appeal with an issue that has not been sorted out by a court of first instance, thereby creating "'[e]normous confusion and interminable delay.'" *Id.* at 1084, *quoting Johnston v. Reily*, 160 F.2d 249, 250 (D.C. Cir. 1947). In the transfer context, this suggestion would deprive parties who lose before the transferee district court, and anticipate losing as well before the transferee circuit court, of the incentive to avoid interlocutory appeal and to forestall settlement in the hope of having the case retransferred to the circuit whose more favorable case law renders appellate success more likely.

[18] If transferor circuit law were applicable, the transferee district court might also remand the case to the respective transferor districts for resolution of an issue. Depending upon the issue and its disposition, retransfer (even after interlocutory appeal in the transferor circuit) might be in order. The cost and delay of proceeding in this manner undercuts, however, Congress' purpose in enacting section 1407.

ingly divergent courses. The District of Columbia plaintiffs, in conducting discovery, will have to pursue evidence of fault on the part of KAL, whereas the New York plaintiffs would be able to recover without such a showing. The entire course of discovery, and thus the motions that come before Chief Judge Robinson, would differ entirely between what would have become, in effect, two separate groups of consolidated cases. These differences would be further magnified by the vastly different incentives for settlement facing the two groups of plaintiffs. The District of Columbia plaintiffs, having to prove fault, will presumably be more amenable to settlement than would be the New York plaintiffs. All in all, therefore, it is unlikely that the bifurcated ruling would preserve, to any significant extent, either the efficiency or the consistency that section 1407(a) was intended to promote.

Under the New York plaintiffs' rule, therefore, the threat that the Second Circuit would reverse Chief Judge Robinson and thereby unravel the New York cases is averted, in effect, by preemptively unraveling them in the transferee court. This seems to be a high price to pay—a virtual abandonment of the efficiency and consistency goals of section 1407(a)—to protect against a threat, i.e. unraveling in the transferor circuit courts, that could instead be avoided, at no cost to consistency and at a much lower cost in efficiency, through interlocutory appeal to the transferee circuit court and subsequent application by the transferor circuit of the law of the case doctrine.

The price that must be paid in abandoning the norm of independent judgment, however, looms even larger when one realizes that the New York plaintiffs have presented us with the deceptively easy alternative by applying *Polish Airlines* to the New York cases, without suggesting to us how the district judge should have ruled with respect to the cases from districts in the First and

Sixth Circuits, which have not decided this issue.[19] In attempting to rule as would a district court in those circuits, he could have simply applied his own ruling to those cases, happy to believe that, if called upon, those circuits would see things his way. Or, taking to heart the New York plaintiffs' contention that, under *Van Dusen*, transfer should result in merely "a change of courtrooms,"[20] he could have seriously attempted to divine how the First and Sixth Circuits might interpret the Convention if called upon to do so.

This enterprise is far more problematic than *Erie*'s familiar requirement that a federal court assume the perspective of the highest court in each transferor state, and anticipate how each one of those courts would decide an issue of state law. As to some *Erie* issues, the transferor states will have significantly different laws; as to others, such as those addressed by the sundry and not entirely "uniform" codes adopted by the several states, there may be only subtle differences, difficult to discern, among them. Regardless of the difficulty, however, the duty of the transferee court under *Van Dusen* and *Erie* is simply to arrive at what it, in good faith, believes to be an accurate statement of each state's law, as applied to the facts before it. When this results in the transferee court rendering different judgments in cases transferred

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[19] We see nothing in section 1407(a) that would justify a transferee court in applying transferor precedent when it is clear, as is *Polish Airlines* in the Second Circuit, but not trying to discern what other transferor circuits would decide when their case law is not as clear on the precise point in question but offers some guidance. Introducing such a distinction would constitute an act of legislation appropriate for Congress, not of interpretation of the existing statute by a court. Hence, either a transferee court must apply its own interpretation of federal law to all transferred cases, or it must attempt to apply what it believes to be each transferor court's probable interpretation. There is no middle road.

[20] 376 U.S. at 639.

from different fora, therefore, it is only because the states in question have exercised their undoubted "right to pursue local policies diverging from those of [their] neighbors." [31]

When we turn to questions involving federal law, the transferee judge's task becomes much more difficult, because here the court deals with a single federal law that can ultimately have only one proper interpretation. For example, in the instant case, a violation of the "10-point type" rule cannot both impose *and* not impose unlimited liability under the Warsaw Convention; either the Second Circuit or we have interpreted it erroneously.[32] As a result, any attempt by Chief Judge Robinson to predict how the First and Sixth Circuits would interpret the Warsaw Convention on this precise point would necessitate casuistical musings concerning whether another circuit's case law might be read to compel, or even perhaps just to suggest, an interpretation in conflict with his.[33] Such intellectual practices fall within the domain of the sophist, not that of the judge.

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[31] *Klaxon Co. v. Stentor Elec. Mfg. Co., Inc.*, 313 U.S. 487, 496 (1941).

[32] Albeit not necessarily "clearly erroneous" for purposes of the law of the case doctrine. *See* note 15, *supra*.

[33] *See* Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 Yale L.J. 677, 713-14 (1984). For the federal-law transfer situation to be analogous to what occurs under *Van Dusen*, in which the federal court assumes the perspective of the transferor state's highest court (i.e. of the supreme interpreter of the state's law), the question in the KAL case would *not* be (as the New York plaintiffs suggest it is)—"how would the other federal circuits interpret the Warsaw Convention?" Rather, the analogous question would be the same one that a circuit court normally poses when addressing an issue of federal law—"how would the U.S. Supreme Court (the supreme interpreter of federal law) interpret the Warsaw Convention?"

The practice suggested by the New York plaintiffs, therefore, differs qualitatively from accepted instances in which a federal court must apply the ruling of another court. Under the preclusion doctrines of res judicata, collateral estoppel, and the law of the case, a court applies a known ruling of another court—usually to the very facts from which it arose. Under the New York plaintiffs' suggestion, however, the transferee district court will often have to engage in pure guesswork in order to apply another circuit's precedents, if any there be, to the unique facts before it. In this respect, they propose a practice that is unprecedented in the context of federal courts interpreting federal law. Furthermore, when the transferee district court will not be able to rely on a decision on point, there is no assurance, try as it might, that it will always be able correctly to predict how an undecided transferor circuit will eventually decide the kind of close issue over which circuits tend to split. As a result, even though abandonment of the norm of independent judgment appears at first glance to provide a way to prevent cases from unraveling after returning to the transferor courts, the effectiveness of that course might be quite limited, in this case perhaps only to the New York cases.

I have undertaken to assess the implications of applying alternative interpretive models—the exercise of independent judgment versus the application of transferor court case law—in order to determine whether, although congressional silence would generally counsel us against doing so, we should nevertheless break with practice by having transferee courts apply transferor circuit case law. Such a break, as I indicated, would be justified only if the exercise of independent judgment would frustrate Congress' remedial purposes in enacting section 1407(a). The analysis of these alternatives, however, tends to confirm that we should adhere to existing practice. The purposes of section 1407(a) would more likely be frustrated,

not when a transferee district court exercises independent judgment, but rather when it attempts to anticipate the various transferor courts.[24]

Section 1407(a) was enacted "to eliminate the potential for conflicting contemporaneous pretrial rulings by coordinate district and appellate courts."[25] Under the New York plaintiffs' rule, however, transfer under section 1407(a) will simply yield "conflicting contemporaneous pretrial rulings" by one judge rather than by many. The transferee judge, on the most insignificant as well as outcome-determinative rulings, will have to wonder whether he or she would rule differently if located instead in one of the transferor circuits. No doubt, a considerable amount of the judge's time will be consumed attempting to determine whether litigants accurately describe differences in other circuits' interpretations of federal law. And, if the judge is persuaded that some difference does or *may* exist, it will be no small task to explain the inconsistent and contradictory rulings.

The conduct of multidistrict litigation, which is invariably time consuming as it is, will grind to a standstill while transferee judges read separate briefs, each based on the case law of a transferor circuit, on a single issue of federal law. Much of the advantage that transfer was intended to produce, and particularly the desiderata of furthering efficiency and preventing inconsistent rulings, will be lost by requiring transferee judges to wear a number of judicial hats. It is the prospect of this kind of quagmire that is likely to yield the result feared by the Court in *Van Dusen*—that courts would be "reluctant to grant transfers" and thereby "frustrate the remedial

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[24] *A fortiori*, when it throws up its hands and remands the cases to the transferor courts for determination of the issue. *See* note 18, *supra*.

[25] *In re Plumbing Fixtures Cases*, 298 F.Supp. at 491-92.

purposes of [section 1407]."[26] It may well be preferable to have multidistrict litigation remain dispersed in the courts of origin than to have transferee judges burdened with the hopelessly complex task of sitting as several federal judges at once.[27] Consequently, even though having transferee judges exercise independent judgment may in isolated instances result in an unraveling of a transferred case, I believe that this approach, although not a perfect solution, is by far the less problematic and the more consistent with the intent of Congress in enacting section 1407.

II. Beyond Interpretation

Under section 1407(a), cases involving federal law are transferred from one circuit to another, and are conceivably subject to appellate review in several circuits, at various stages in the litigation. Given these facts, any resolution of the problem of whose case law will be applied entails, under the statute as currently written, some cost in efficiency and consistency; losses are truly unavoidable. They may be minimized, however, and that is why I reject the New York plaintiffs' suggestion, which in addition to exacting a much higher cost also requires federal courts, in the absence of any congressional mandate, to depart completely from the accepted norm of indepenednt circuit interpretation.

In order for cases to be transferred from one circuit to another with a minimum loss of efficiency and con-

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[26] *Van Dusen*, 376 U.S. at 636.

[27] This is particularly the case insofar as the rule applicable to transferee judges under section 1407(a) is applied as well in the analogous context of a transfer under section 1404(a). The prospect of a trial presided over by a judge expected to simulate different district courts throughout as many as twelve circuits is likely to discourage any court from ordering transfer under section 1404(a).

sistency, the only solution is for Congress to amend section 1407(a), as well as section 1404(a),[28] to provide that rulings by a court in one circuit will not be reviewed under the case law of another circuit. In this respect, the options seem to be: (1) adopt the New York plaintiffs' position, and have the law of the transferor court govern a transferred case throughout its disposition; (2) provide that a ruling in a transferred case is to be reviewed, by whatever circuit court, under the case law of the circuit in which the ruling was made; and (3) make transfer comprehensive, extending through trial and appeal in the transferee circuit (applying its transfer circuit precedents, of course). For the reasons I have given, the first option involves considerable costs. Because the transferee court will have to treat cases from different circuits differently, this alternative virtually guarantees the sacrifice of the efficiency and consistency gains that were supposed to result from conducting consolidated pretrial proceedings. Furthermore, it places the transferee district court in the almost impossible position of determining whether courts of appeals in other circuits would disagree in interpreting federal law.

The second option appears to be far more advantageous. Under this scheme, the transferee district court applies its circuit case law—which it knows best—and its own best judgment to all the transferred cases. By treating all the cases similarly, the statutory goals of efficiency and consistency would be immediately furthered. In addition, the risk that these goals would be undermined by a later unraveling of the cases in the transferor courts is substantially lessened. In reviewing a transferee district court's ruling, the transferor circuit courts would all apply the transferee circuit's case law, and in conducting this review they would be aided by the

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[28] *See* note 27, *supra*.

opinion of the transferee district court.[29] (The transferor circuit courts would thus be placed in a far more advantageous position than is the transferee district court under the New York plaintiffs' suggestion, which would often have to engage in pure guesswork, entirely without guidance about how a court in another circuit would rule.) Furthermore, transferor circuit courts are far less likely to reach conflicting conclusions if they all interpret transferee circuit case law than if they each exercise independent judgment. Consequently, unraveling is not likely to occur under this rule.

The second option is also more attractive because it involves a lesser departure from the norm of independent judgment. Whereas a transferee district judge must make frequent rulings, few cases ever return to the transferor courts and—unlike the first option—the second option would not create any greater incentive for a litigant to persist until the case is remanded. Moreover, in only a few of those that do return will the transferor circuit court have to review a ruling of the transferee district judge on an issue of federal law that will create disagreement among the circuits and thereby require the transferor circuit court, in applying transferee circuit case law, to issue a decision that does not reflect its own view.[30]

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[29] It may also be that the transferor circuit courts should afford some deference to the transferee district court's application of transferee circuit case law. *Cf. Bishop v. Wood*, 426 U.S. 341, 345-346 & n.10 (1976); *Abex Corp. v. Maryland Cas. Co.*, 790 F.2d 119, 121 (D.C. Cir. 1986); *Hull v. Eaton*, No. 85-6024 slip. op. at 11-12 n.9 (D.C. Cir. August 4, 1987).

[30] In fact, the litigation that followed the Second Circuit's ruling in *Polish Airlines* illustrates this. As indicated above, *supra* note 16 and accompanying text, *Polish Airlines* was decided on interlocutory appeal from a ruling by the transferee district court. After pretrial proceedings were complete, the cases were remanded to the transferor courts for trial. On appeal from one of these trials, the Ninth Circuit

The third option entails all of the benefits of efficiency and consistency and none of the drawbacks of the second option. Insofar as transfer is burdensome for plaintiffs, however, it would tend to magnify their hardship, especially if they are to testify at trial. This detriment may be more or less offset by the reciprocal advantage accruing to a defendant that does not have to defend multiple trials at different places. A risk-averse defendant, on the other hand, might value the diversification of risk attendant to multiple trials, rather than having everything depend—even more than it already does as a result of the relaxation of the mutuality requirement for plaintiffs' use of estoppel—upon the fortuities of a single proceeding. As between the second and third options, therefore, considerable study would be needed in order to make an informed judgment, one that balances the goals of judicial economy and consistency against the distribution of costs imposed on plaintiffs and defendants in the course of realizing those goals.

III. Conclusion

As a court, however, we must address the statute as it is, not as it might be. Nothing in the Supreme Court's opinion in *Van Dusen* nor in the language of section 1407(a) requires a federal court to engage in the unprecedented practice of interpreting federal law through the analytical prism of another circuit's case law. The

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held that calculation of damages was governed by the law of Poland, not that of California. *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1080 (9th Cir. 1987). Accordingly, the plaintiffs received $76,399.78 in damages, $10,000 less than they would have received under California law. Given this disposition, it is not surprising that the Ninth Circuit merely mentions the Second Circuit's holding in passing, *id.*, slip op. at 4, since the question of whether the Convention's $75,000 damage litigation applied had become all but irrelevant.

New York plaintiffs have not shown, nor can I imagine, how the purposes underlying section 1407(a) would be furthered rather than frustrated by that approach. Under these circumstances, I can see no reason to condemn transferee district courts to perform often futile exercises in mental gymnastics.

Accordingly, I reject the New York plaintiffs' argument and join the court's opinion holding that our interpretation of the Warsaw Convention must be applied to all the cases before us.

Judgment of the Court of Appeals for the District of Columbia Circuit

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1987

Misc. No. 83-00345

No. 85-5982

IN RE: Korean Air Lines Disaster of September 1, 1983

Plaintiff's Steering Committee,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Before:

RUTH B. GINSBURG, WILLIAMS, and D.H. GINSBURG,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam

For The Court

/s/ GEORGE A. FISHER

George A. Fisher
Clerk

Date: September 25, 1987

Opinion for the Court filed by Circuit Judge Ruth B. Ginsburg.

Concurring opinion filed by Circuit Judge D.H. Ginsburg, in which Circuit Judge Williams joins.

Order of the Court of Appeals for the District of Columbia Circuit

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1987

Misc. No. 83-00345

No. 85-5982

[stamped Nov. 16, 1987]

IN RE: Korean Air Lines Disaster of September 1, 1983.

Plaintiffs' Steering Committee,

Appellant.

Before:

Wald, *Chief Judge*; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Bork, Starr, Silberman, Buckley, Williams, D. H. Ginsburg and Sentelle, *Circuit Judges*.

ORDER

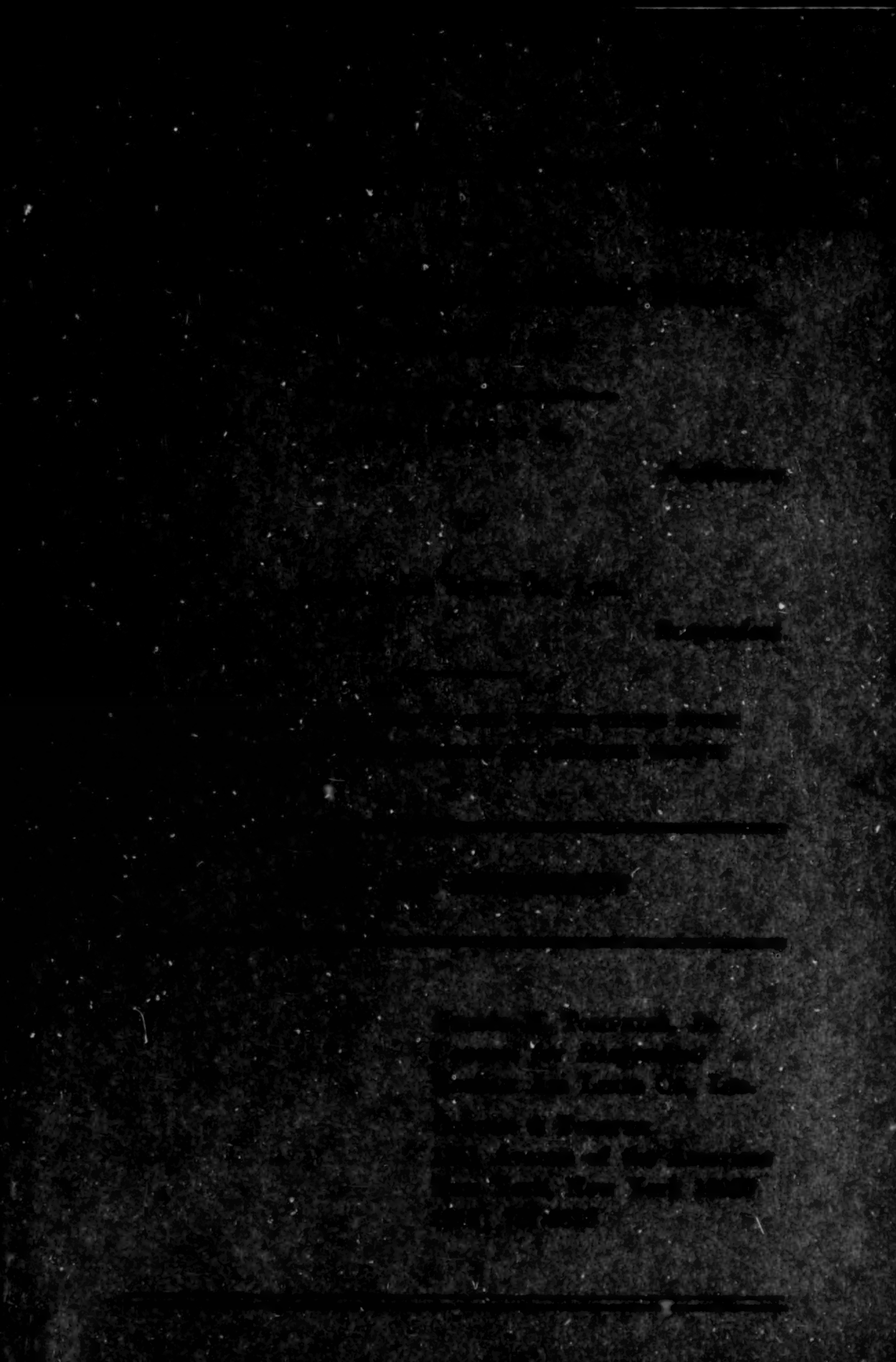
The petition of Plaintiffs' Steering Committee for rehearing *en banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the petition for rehearing *en banc* is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, Clerk

BY:/s/ ROBERT A. BONNER
Robert A. Bonner
Deputy Clerk



Question Presented

In actions governed by the Warsaw Convention, a treaty of the United States, does the treaty sanction of unlimited liability, set forth in Article 3(2) of the Convention, which by its own terms applies only "if a passenger is accepted without a passenger ticket having been delivered," also apply where the delivered passenger ticket contains an Advice as to the applicability of the Warsaw Convention to the transportation which is printed in 8 point type size rather than the 10 point type size specified in the inter-carrier Montreal Agreement?

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No. 87-1055

In the

Supreme Court of the United States

October Term, 1987

Elisa Chan, *et al.*,

Petitioners,

v.

Korean Air Lines Co., Ltd.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT

Statement of the Case

This multidistrict litigation involves wrongful death actions arising from the premeditated murder by the Soviet Union of 269 innocent passengers and crew on board Korean Air Lines Co., Ltd. [KAL][1] Flight KE 007 on September 1, 1983. Flight KE 007, en route from New York to Seoul via Anchorage, was stalked, deliberately fired upon and destroyed over the Sea of Japan by Soviet military aircraft. All persons on board the aircraft perished.

In answering the various complaints, KAL pleaded, *inter alia,* affirmative defenses based upon the provisions of the Warsaw Convention[2] as supplemented by the Mon-

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[1] Respondent Korean Air Lines Co., Ltd., a subsidiary of which is Korean Air Terminal Service Co., Ltd., was sued incorrectly as Korean Air Lines, Ltd.

[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000,

(footnote continued on following page)

treal Agreement,[3] seeking to limit the liability of KAL to the sum of $75,000 per passenger.

It is undisputed that the rights of the parties are governed exclusively by the provisions of a treaty of the United States known as the Warsaw Convention. Each of petitioners' decedents was traveling on Flight KE 007 pursuant to a passenger ticket providing for international transportation by air within the meaning of the Convention. In exchange for the presumption of liability established by Article 17 of the Warsaw Convention, the carrier's liability under the Convention is excluded by requisite proof under Article 20 or is limited in accordance with Article 22. By reason of Article 3(2) of the Convention, however, the carrier is not entitled to avail itself of these provisions of the Convention which exclude or limit its liability if the carrier "accepts a passenger without a passenger ticket having been delivered." 49 Stat. 3015. (App. 3a) It is undisputed that KAL delivered passenger tickets to each of petitioners' decedents as required by Article 3(2).

The passenger tickets delivered by KAL included a point in the United States as a place of origin, destination or agreed stopping place. Accordingly, the provisions of a private agreement among air carriers known as the Montreal Agreement also applied to the transportation of petitioners' decedents. In the Montreal Agreement, participating carriers agree with respect to such transportation to increase the limit of liability under Article 22 of the Warsaw Convention to $75,000 per passenger, to waive the "all necessary measures" defense of Article 20 of the Convention and to advise each passenger of the applicability

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(footnote continued from previous page)

T.S. No. 876 (1934) *reprinted in* 49 U.S.C. § 1502 note (1976). (Relevant provisions of the Warsaw Convention are reprinted at App. 3a-8a.)

[3] Agreement Relating to Liability Limitations of the Warsaw Convention and The Hague Protocol, Agreement CAB 18900, note following 49 U.S.C. § 1502, *reprinted in* Civil Aeronautics Board, *Aeronautical Statutes and Related Material* 515-516 (1974). (App. 9a-12a)

of the limitation of liability in an "Advice to International Passenger on Limitation of Liability [Montreal Advice] . . . printed in type at least as large as 10 point modern type". (App. 10a)

KAL timely delivered passenger tickets containing the Montreal Advice but some of the delivered tickets contained the Montreal Advice printed in 8 rather than 10 point type size. The Montreal Agreement does not provide for any sanction for the failure to print the Montreal Advice in 10 point type size.

Prior to trial and during the course of liability discovery proceedings, certain plaintiffs, petitioners herein, filed a motion for partial summary judgment dismissing KAL's limitation of liability defense and seeking to impose upon KAL absolute and unlimited liability for damages resulting from the deaths of petitioners' decedents. (J.A. 9-10) In support of their motion, petitioners argued that KAL was not entitled to avail itself of the Convention's limitation of liability because the Montreal Advice set forth in the KAL passenger tickets delivered to petitioners' decedents was printed in 8 rather than 10 point type size.

The District Court denied petitioners' motion. The Court of Appeals for the District of Columbia Circuit affirmed, refusing to impose upon KAL the treaty sanction of unlimited liability because of a printing irregularity in the Montreal Advice. *See In re Korean Air Lines Disaster of September 1, 1983*, 829 F.2d 1171 (D.C. Cir. 1987) (J.A. 376-441), *aff'g*, 664 F. Supp. 1463 (D.D.C. 1985) (J.A. 387-417) [*Korean Air Lines Disaster*] *and* 664 F. Supp. 1488 (D.D.C. 1987).[4] (J.A. 372-375) The Court of Appeals adopted the District Court's holding that the treaty sanction of unlimited liability may be imposed *only*

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[4] Although not expressly included in the question on which the Court granted certiorari, the Court of Appeals, and the District Court on remand, also addressed the question whether they were bound to follow two decisions of the United States Court of Appeals for the Second Circuit, *Lisi* v. *Alitalia–Linee Aeree Italiane*,

(footnote continued on following page)

for nondelivery of the passenger ticket and that the Montreal Agreement does not amend the Warsaw Convention to require printing of the Montreal Advice in 10 point type size as a condition precedent to limited liability under the Convention. *Korean Air Lines Disaster*, 829 F.2d at 1173. (J.A. 379) The Court of Appeals below rejected two prior decisions of the Court of Appeals for the Second Circuit as incorrect interpretations of the Warsaw Convention. *See Lisi* v. *Alitalia-Linee Aeree Italiane*, 253 F. Supp. 237 (S.D.N.Y.), *aff'd*, 370 F.2d 508 (2d Cir. 1966), *aff'd by an equally divided Court*, 390 U.S. 455 (1968) [*Lisi*]; *In re Air Crash Disaster at Warsaw, Poland on March 14, 1980*, 705 F.2d 85 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983) [*LOT*].

Summary of Argument

In urging reversal of the judgment of the court below, petitioners confuse nondelivery of a passenger ticket, the prerequisite to the application of the treaty sanction of unlimited liability under Article 3(2) of the Warsaw Convention, with the 10 point type size specification of the Montreal Agreement. In seeking to impose the Article 3(2) treaty sanction for an alleged "breach" of the Mon-

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(footnote continued from previous page)

370 F.2d 508 (2d Cir. 1966), *aff'd by an equally divided Court*, 390 U.S. 455 (1968) and *In re Air Crash Disaster at Warsaw, Poland, on March 14, 1980*, 705 F.2d 85 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983), in the eleven cases originally filed in New York federal courts and transferred to the District Court for the District of Columbia pursuant to 28 U.S.C. § 1407. The Court of Appeals, affirming the District Court, correctly held that on a matter of treaty interpretation only the Supreme Court can render decisions binding on lower federal courts. *Korean Air Lines Disaster*, 829 F.2d at 1176 (J.A. 385), *aff'g*, 664 F. Supp. at 1489. (J.A. 373-374). *See also* Marcus, *Conflicts Among Circuits and Transfers within the Federal Judicial System*, 93 Yale L.J. 677 (1984); *H.L. Green Co.* v. *MacMahon*, 312 F.2d 650 (2d Cir. 1962), *cert. denied*, 372 U.S. 928 (1963); *Clayton* v. *Warlick*, 232 F.2d 699 (4th Cir. 1956); *Roth* v. *Bank of the Commonwealth*, [1981-1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,267 at 91,707 (W.D.N.Y. 1981); *Scheinbart* v. *Certain-Teed Products Corp.*, 367 F. Supp. 707 (S.D.N.Y. 1973).

treal Agreement, petitioners make two incorrect assumptions.

First, the Warsaw Convention does not, as petitioners argue, impose a sanction of unlimited liability for failure to deliver a ticket containing the Article 3(1)(e) "statement" that the transportation is subject to the Convention's liability rules. 49 Stat. 3015. (App. 3a)

In plain and unambiguous language, Article 3(2) of the Convention imposes the extreme treaty sanction of unlimited liability only if the carrier "accepts a passenger without a passenger ticket having been delivered." 49 Stat. 3015. (App. 3a) This treaty sanction does not apply if the Article 3(1)(e) "statement" is omitted from a delivered ticket. It is undisputed that KAL delivered passenger tickets which contained the "statement" specified in Article 3(1)(e) of the Convention.

Second, the Montreal Agreement cannot and does not amend the Warsaw Convention to impose unlimited liability for failure to deliver a ticket containing the Montreal Advice in 10 point type size. The Montreal Agreement is a private agreement among air carriers and is not an agreement among sovereign states. Under well accepted domestic and international legal principles, the Montreal Agreement cannot amend in any way a multilateral treaty such as the Warsaw Convention. In addition, the Agreement prescribes no sanction for failure to comply with any of the provisions thereof, including the type size stipulation.

Similarly, the Department of Transportation [DOT] Economic Regulations[5] providing that, as a condition to the holding of a foreign air carrier permit, the carrier shall provide the Montreal Advice in 10 point type size, do not and cannot amend the Warsaw Convention to impose unlimited liability for failure to deliver a ticket with the

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[5] *See* 14 C.F.R. §§ 203.4, 203.5, 213.7 and 221.175(a). (App. 15a-18a).

Montreal Advice in 10 point type size. *See Trans World Airlines* v. *Franklin Mint Corp.*, 466 U.S. 243, 252 (1984). Thus, KAL cannot be held subject to unlimited liability to petitioners on the basis that KAL has violated its foreign air carrier permit by failing to comply with the 10 point type size specification of a DOT Regulation.

The Court of Appeals below affirmed and adopted the District Court decision and refused to follow the *Lisi* and *LOT* decisions of the Court of Appeals for the Second Circuit,[6] because those decisions cannot be reconciled with the clear and unequivocal language and history of the Warsaw Convention and Montreal Agreement.

In *Lisi*, the Second Circuit ignored the unambiguous language of Article 3(2) and the drafting history with respect thereto, and judicially rewrote the Warsaw Convention to circumvent what the court perceived to be an unacceptable limitation of carrier liability. The court in *Lisi* improperly added to the Warsaw Convention a judicial sanction of unlimited liability unless the delivered passenger ticket gives "adequate notice" of the carrier's limited liability. In *LOT*, once again motivated by judicial distaste for the treaty's liability limitation, the Second Circuit compounded its error in *Lisi*, ignored well-accepted principles of law which permit only sovereign states to amend treaties and held that the Article 3(2) sanction of unlimited liability applies unless the Montreal Advice is printed in 10 point type size.

Judicial frustration with the Convention's liability limitation does not justify judicial revision of the treaty's plain and unambiguous terms. As the District Court correctly concluded:

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[6] Petitioners also rely on a Fifth Circuit decision, *In re Air Crash Disaster near New Orleans, Louisiana*, 789 F.2d 1092 (5th Cir. 1986), *aff'd in pertinent part*, 821 F.2d 1147 *(en banc)*, petition for cert. filed sub nom. *Pan American World Airways* v. *Lopez*, —— U.S. ——, 55 U.S.L.W. 3369 (Nov. 6, 1987), which simply adopted the Second Circuit decisions without analysis or discussion.

> Construing the phrase "accept a passenger without a passenger ticket having been delivered" to include physically delivered tickets which fail to contain "adequate notice" of the Warsaw/Montreal limitation, courts have made a way for full recovery where there was none.

Korean Air Lines Disaster, 664 F. Supp. at 1472. (J.A. 405)

The only circumstance pursuant to which a carrier is subject to unlimited liability to passengers under Article 3(2) of the Warsaw Convention—failure to deliver a passenger ticket—has never been altered by treaty amendment to which the United States adheres. The judiciary, therefore, is obliged to enforce the Convention as originally worded.

ARGUMENT

I

The Treaty Sanction of Unlimited Liability Is Imposed Only for Nondelivery of a Passenger Ticket

A. *The Rules for Interpreting a Treaty Are Well Established*

When interpreting a treaty provision such as Article 3 (2) of the Warsaw Convention, the first step is to "begin with the text of the treaty and the context in which the written words are used." *Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, 486 U.S. ——, 108 S.Ct. 2104, 2108 (1988), quoting *Air France* v. *Saks*, 470 U.S. 392, 397 (1985); *see also Maximov* v. *United States*, 373 U.S. 49, 53-54 (1963). Because a treaty is a contract among sovereign nations, its meaning must be taken "as understood in the public law of nations, and not in any artificial or special sense impressed upon [it] by local law. . ." *De Geofroy* v. *Riggs*, 133 U.S. 258, 271 (1890); *accord Pizarro*, 2 Wheat. 227, 246 (1817) (the "language of the law of na-

tions . . ." is "always to be consulted in the interpretation of treaties").

Article 3(2) of the Warsaw Convention clearly provides the only circumstance when the sanction of unlimited liability is imposed on a carrier. It would not be proper for the Court to create by judicial action another circumstance for the imposition of the sanction. The impropriety of the Court doing so is particularly compelling since the parties to the Warsaw Convention have expressed the only circumstance where the sanction should apply. Compare, for example, Article 3(2) with Articles 4(4) and 9, relating to baggage and cargo respectively, where additional circumstances for the imposition of the sanction are set forth. (App. 3a-6a)

As the Court recently reaffirmed: "Treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Schlunk*, 486 U.S. at ——, 108 S.Ct. at 2108, quoting *Saks*, 470 U.S. at 396; *see also Sumitomo Shoji America* v. *Avagliano*, 457 U.S. 176, 180 (1982) (the "clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories'"); *Maximov* v. *United States*, 373 U.S. 49, 54 (1963) (petitioners must demonstrate that a literal reading of the treaty language is "inconsistent with the intent or expectations of its signatories").

The drafting history of Article 3 of the Warsaw Convention and attempts by various signatories, including the United States, to amend Article 3, confirm that the treaty sanction of unlimited liability under Article 3(2) applies only to nondelivery of the passenger ticket. Thus, the treaty language set forth in Article 3(2) must be applied because:

> In the first place, this court does not possess any treaty-making power. That power belongs by the constitution to another department of the government; and to alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this Court supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subect-matter; and having found that, our duty is to follow it as far as it goes, and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind.

Amiable Isabella, 6 Wheat. 1, 71 (1821).

B. *Article 3(2) of the Warsaw Convention Expressly States That the Treaty Sanction of Unlimited Liability Applies Only "If the Carrier Accepts a Passenger Without a Passenger Ticket Having Been Delivered"*

Article 3(2) of the Warsaw Convention establishes one[7] of the instances when an air carrier may be liable without limit in the transportation of passengers.

Article 3, as adhered to by the United States in 1934, provides:

Article 3

> (1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:
>
> (a) The place and date of issue;
> (b) The place of departure and of destination;

[7] The other instance is under Article 25, pursuant to which a carrier may be held liable without limit if the passenger's injuries were the result of the carrier's "wilful misconduct". 49 Stat. 3020. (App. 8a)

(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;
(d) The name and address of the carrier or carriers;
(e) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, *if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.*

49 Stat. 3015 (emphasis added) (App. 3a); *see also* Solicitor General's Brief at App. 1a (official French version).

Article 3(2) unambiguously sets forth the *only* circumstance under which an air carrier, such as KAL, is subject to the sanction of unlimited liability with respect to the ticketing of passengers. Article 3(2) states unequivocally that the limitation of liability is unavailable to a carrier *only* "if the carrier accepts a passenger without a passenger ticket having been delivered." *See, e.g., Stratis* v. *Eastern Air Lines*, 682 F.2d 406, 411 (2d Cir. 1982); *Grey* v. *American Airlines*, 95 F. Supp. 756, 758 (S.D.N.Y. 1950), *aff'd*, 227 F.2d 282 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956); *see also* Miller, *Liability in International Air Transport* at 83 (1977) ("[T]he Convention provides a sanction *only* for non-delivery of the ticket. If there is solely a failure to comply with the particulars listed in Article 3(1), there is no sanction at all.").

The highest court of Canada, a nation adhering to the Warsaw Convention, directly addressed this precise issue and held:

> [T]he words of art. 3(2) are plain and can admit of no misunderstanding. . . . The benefit of the limitation will be lost only where no ticket is delivered.

Ludecke v. *Canadian Pacific Airlines Ltd.*, 98 D.L.R.3d 52, 57 (Canada 1979). (App. 29a-40a)

Contrary to petitioners' assertion, no language in Article 3 requires that a passenger be given any "warning" of limited liability before the Warsaw Convention's liability limitations will be applicable. Petitioners' Brief at 5, 9 & 33. While Article 3(1)(e) provides for inclusion of a "statement" ("l'indication") regarding the applicability of the Warsaw Convention, there is no language in Article 3 denying to the carrier the limitation of liability if the passenger ticket omits this "statement" entirely from the ticket nor does any treaty language require this "statement" to be printed in a particular type size. All that Article 3 requires in order for the carrier to avail itself of the liability limitation is that a passenger ticket be delivered. As the District Court decision, adopted by the Court of Appeals, properly stated:

> Although Article 3(1)(e) specifies that a passenger ticket shall contain "[a] statement that the transportation is subject to the rules relating to liability established by this convention," Article 3(2) says nothing regarding the "adequacy" of notice or any other particulars of the required statement. . . . Indeed, inadequate notice through the statement could be considered an "irregularity" or defect in the passenger ticket which "shall not affect the existence or the validity of the contract of transportation, which shall nonetheless be subject to the rules of this convention."

Korean Air Lines Disaster, 664 F. Supp. at 1472-73. (J.A. 406)

C. *The History of the Warsaw Convention, the Negotiations and the Practical Construction Adopted by the Parties Thereto, Confirm That the Treaty Sanction Applies Only if the Carrier Does Not Deliver a Passenger Ticket*

1. Disregarding the Unequivocal Language in Article 3(2) Would Violate the Intent and Expectations of the Convention's Drafters

When addressing a "difficult or ambiguous" passage in a treaty, the Court "may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Schlunk*, 486 U.S. at ——, 108 S.Ct. at 2108, quoting *Saks*, 470 U.S. at 396; *see also Sumitomo Shoji America* v. *Avagliano*, 457 U.S. 176, 180 (1982); *Maximov* v. *United States*, 373 U.S. 49, 54 (1963).

Contrary to the assertions of the Solicitor General and petitioners, Article 3 of the Warsaw Convention is neither "difficult" nor "ambiguous." The drafting history of Article 3 confirms that the sanction of unlimited liability applies *only* to nondelivery of the passenger ticket.[8]

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[8] The treaty sanction resulting only from nondelivery of the ticket also is consistent with the state of the law in Europe in the 1920s with respect to passengers' rights vis-a-vis air carriers. *See Air France* v. *Saks*, 470 U.S. 392, 399 (1985) (The Court must look to the "expectations" of the "continental jurists" who drafted the Convention.); *Rocca* v. *Thompson*, 223 U.S. 317, 331 (1912) (The treaty is "to be read in the light of the conditions and circumstances existing at the time" at which it was drafted.). Prior to the Convention, air carriers in civil law countries were permitted unilaterally to preclude passengers from asserting any "tort" rights against air carriers, but, with respect to goods/cargo, commercial contracts were subject to negotiation. The Convention's compromise, with respect to passengers, between no liability and imposing unlimited liability, was recognized by the French delegate who noted:

> Those who did not participate in the work of the CITEJA and who read this article [22] can imagine that it creates a favorable system in favor of the carrier. They say: Why not apply the common law to him?

(footnote continued on following page)

The first International Conference on Private Aviation Law, the precursor to the Conference in Warsaw, was held in Paris in 1925. *See Air France* v. *Saks*, 470 U.S. 392, 401 (1985). At this Conference, the delegates approved a draft convention which was submitted to various governments for their review. The draft provided for a limitation on the liability of air carriers and for the utilization of passenger tickets and air waybills. The delegates also created a committee composed of aviation law experts, the Comite International Technique D'Experts Juridiques Aeriens [CITEJA], to develop a tentative agreement to be presented to a full conference. *See* Ide, *The History and Accomplishments of the International Technical Committee of Aerial Legal Experts (C.I.T.E.J.A.)*, 3 J. Air L. & Com. 27, 30-31 (1932) [Ide, *History of CITEJA*].

At the First Session of CITEJA, held in Paris in 1926, CITEJA was divided into four drafting "Commissions." Ide, *History of CITEJA* at 32-33. The responsibility for drafting provisions governing the air carrier's liability to passengers and with respect to goods/cargo were assigned to the "Second Commission." *Id.*

(footnote continued from previous page)

> Well, in reality, this Convention creates against the air carrier an exceptional system, because in the majority of the countries of the world, contracts of carriage are concluded under a system of free contract. *The carrier is free to insert in the contract clauses which exclude or reduce his liability*, as much for goods as for travelers. You are of course aware that they have lost no opportunity to do so, and presently many air carriers operate under this unregulated contractual system, and, in practice, in fact, they are not liable.
>
> One has desired to imposed upon them a compulsory system of liability. . . . [I]t was natural not to impose on them common law liability. It's in the spirit of compromise that one has said: All that can be asked from the air carrier is to take reasonable measures to avoid the damage, to have his aircraft in good flying condition, and to make such that they are well flown.

Second International Conference on Private Aeronautical Law Minutes (Warsaw, 1929) (R. Horner & D. Legrez trans. 1975) at 47-48 (emphasis added). (App. 26a-27a)

The first draft of a provision to govern the passenger ticket was considered at the Third Session of CITEJA held in Madrid, Spain from May 24-29, 1928. *See Comite Internationale Technique D'Experts Juridique Aeriens, Compte Rendu de la Troisieme Session* (May 1928) [CITEJA Minutes, Third Session]; Solicitor General's Brief at App. 59a-92a. The draft Article 3 passenger ticket provision provided.

> For the transportation of passengers, the carrier must deliver a passenger ticket which *shall contain the following particulars:*
>
> a) the place and date of issue;
> b) the place of departure and of destination;
> c) a brief indication of a route to be followed, as well as the agreed stopping places;
> d) the name and address of the carrier or carriers.
>
> The passenger ticket must also contain a *statement* that the transportation is subject to the rules relating to liability established by this Convention.
>
> The absence, irregularity, or loss of this transportation document shall not affect the existence or the validity of the contract or transportation.
>
> If, for international transportation, the carrier *accepts a passenger without a passenger ticket containing the particulars indicated above* having been made out, the contract of transportation shall still be subject to the rules of this Convention, but the carrier shall not be entitled to avail himself of those provisions of this Convention which exclude fully or partially his direct liability or that deriving from the negligence of his agents.

CITEJA Minutes, Third Session (May 24, 1928) (emphasis added); Solicitor General's Brief at App. 79a-82a; *see also* Ide, *History of CITEJA* at 34-35.

Contrary to the assertions of petitioners (Petitioners' Brief at 30-31) and the Solicitor General (Solicitor General's Brief at 17), the "CITEJA working papers" accompanying this initial version of Article 3 do *not* "evidence that the drafters intended" to impose the sanction of unlimited liability upon the carrier for the delivery of a passenger ticket without the paragraph 2 "statement." Rather, the initial draft of Article 3 imposed the sanction only for the delivery of a passenger ticket not containing the required paragraph 1 "particulars." The paragraph 2 "statement" regarding the applicability of the Convention clearly was *not* included as a paragraph 1 "particular."

At the May 26, 1928 meeting during the Third Session, the delegates, leaving the list of particulars substantially unchanged, amended the sanction provision of Article 3 to read as follows:

> If, for international transportation, the carrier accepts a passenger *without a passenger ticket having been made out, or if the ticket does not contain the above-mentioned particulars*, the contract is still subject to the rules of this Convention, but the carrier shall not be entitled to avail himself of those provisions of this convention which totally or partially exclude his direct liability or liability derived from the negligence of his agents.

CITEJA Minutes, Third Session (May 26, 1928) (emphasis added); Solicitor General's Brief at App. 91a.

The effect of this amendment was to make it clear that the sanction of unlimited liability applied if the passenger ticket does not contain the paragraph 1 particulars (the "statement" still was not one of the particulars) *or* if there is no delivery of any ticket. (Even at this early stage of the drafting of Article 3, there was absolutely no reference to imposing the treaty sanction of unlimited liability for failure to include the "statement," let alone for failure to provide the "statement" in a minimum type size.) This version of the sanction was presented to the delegates at the full Conference in Warsaw in October, 1929 as part of Article 3 as follows:

In the carriage of travelers the carrier shall be required to deliver a passenger ticket which *shall contain the following particulars:*

(a) the place and date of issue;
(b) the points of departure and of destination;
(c) summary indication of the route to be followed (via) as well as the contemplated stopping places;
(d) the name and address of the carrier or carriers.

The passenger ticket *shall contain, moreover, a clause* stipulating that the carriage is subject to the system of liability set forth by the present Convention.

The absence, irregularity, or loss of this document of carriage shall not prejudice either the existence or the validity of the contract of carriage.

If, for international carriage, the carrier accepts the traveler without having drawn up a passenger ticket, *or if the ticket does not contain the particulars indicated hereabove*, the contract of carriage shall nonetheless be subject to the rules of the present Convention, but the carrier shall not have the right to avail himself of the provisions of this Convention which exclude in all or in part his direct liability or that derived from the faults of his servants.

Second International Conference on Private Aeronautical Law Minutes (Warsaw, 1929) (R. Horner & D. Legrez trans. 1975) at 258-59 [Horner, *Warsaw Minutes*][9] (emphasis added) (J.A. 182-183), *translated from II Conference Internationale de Droit Prive Aerien, 4-12 October 1929, Varsovie,* ICAO Doc. No. 7838 (1957). (J.A. 182-183)

This version of Article 3 was first considered in Warsaw on October 9, 1929, during the Sixth Session of the

[9] Mr. Horner sets forth an English translation of the Warsaw Convention and its history which differs in insignificant respects from the translation provided by the Solicitor General, *e.g.*, "transportation" for "carriage"; "above-mentioned" for "indicated hereabove".

Conference. The only proposal to amend Article 3 with respect to the sanction discussed at the Conference[10] was made by the Greek delegate. The Greek delegate objected, "as omissions without great importance," to the severity of the sanction of unlimited liability for omission of one or any of the paragraph 1 "particulars." Horner, *Warsaw Minutes* at 303-304; Solicitor General's Brief at App. 116a-118a. The drafting "commission allied to this [the Greek] point of view" and deliberately deleted from the draft the words "or if the ticket does not contain the particulars indicated above." Horner, *Warsaw Minutes* at 150 (J.A. 147); *see also* Drion, *Limitation of Liabilities in International Air Law* at 267-68 (1954).[11]

At the Conference in Warsaw, Mr. Henri De Vos, on behalf of CITEJA, presented a Report on the drafting of the Convention. The CITEJA Report contained a summary of the passenger ticket provisions, including a comment that "the sanction provided for for [*sic*] carriage of passengers without a ticket or with a ticket not conforming to the Convention is identical to that provided for, for carriage of baggage and goods." Horner, *Warsaw Minutes* at 247. (App. 28a) The Solicitor General and petitioners rely on this Report as support for precluding KAL from availing itself of the Article 22 limitation.

[10] Other proposals to amend Article 3 were: a Polish proposal that two copies of the passenger ticket be provided by the carrier; the Hungarian, British and German proposals concerning the wording of Article 3(1)(c); the German and Czechoslovakian proposals concerning the addition of a particular that would indicate the ticket price; and the Polish and Brazilian proposals concerning the addition of a particular on the ticket to indicate the name and address of the passenger. Horner, *Warsaw Minutes* at 148-150. (J.A. 145-153)

[11] The Warsaw delegates' opposition to imposing unlimited liability upon a carrier that failed to include all of the paragraph 1 "particulars" in the passenger ticket was based on the delegates' understanding that the *quid pro quo* for presumptive liability under Article 17 is the carrier's right to invoke the Convention's limitation of liability. *See* Letter from Secretary of State Cordell Hull to President Franklin D. Roosevelt (Mar. 31, 1934), *reprinted in* [1934] U.S. Av. Rep. 240; *see also Korean Air Lines Disaster,* 664 F. Supp. at 1474-1476. (J.A. 409-413)

See Solicitor General's Brief at 17; Petitioners' Brief at 30-31. The Report, however, relates to the draft of Article 3 in which the "identical" sanction—unlimited liability—applied if the passenger ticket or the baggage check does not contain the listed "particulars." The sanction for failure to include the "particulars" was deleted at the Conference with respect to the passenger ticket only. No draft of Article 3 applied the sanction to instances where the carrier omitted from the passenger ticket the "statement" regarding the applicability of the Convention's liability rules. Thus, as the Solicitor General correctly concedes, the drafting history "suggests an intention to eliminate any sanction for an air carrier's violation of Article 3's notice[12] requirement." Solicitor General's Brief at 21.

Thereafter, the full Conference, in the Seventh Session held on October 10, 1929, adopted the final version of Article 3 in which the sanction of unlimited liability expressly is limited to nondelivery of the passenger ticket. The Article 3(2) sanction provision as finally adopted reads:

> Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

49 Stat. 3015. (App. 3a)[13]

As the Solicitor General indicates (Solicitor General's Brief at 20), the Japanese delegation proposed that with

[12] Notwithstanding the Solicitor General's repeated characterization of the "statement" ("l'indication") as a "notice" ("avis"), the Solicitor General has failed to point to a single instance where the Article 3 "statement" was referred to by any delegate at the Warsaw Conference as a "notice".

[13] Just as the English translation of the Minutes of the Conference set forth in Horner, *Warsaw Minutes* differs in insignificant respects from the Solicitor General's translation (*see* discussion, *supra* at 16 n.9), the English translation of Article 3 as reported in 49 Stat. 3015 differs in insignificant respects from Article 3 as translated in Horner, *Warsaw Minutes*.

respect to Articles 3 and 4, "the clause concerning liability [should be made] compulsory" as in Article 9 (originally Article 17). Horner, *Warsaw Minutes* at 301; Solicitor General's Brief at App. 118a. From this, the Solicitor General speculates that the final version of Article 3 does not reflect the delegates' acceptance of the Japanese proposal because the delegates were confused when they amended the preliminary draft. *See* Solicitor General's Brief at 18-21. The Minutes of the Conference reflect no confusion or discussion whatsoever concerning the Japanese proposal. Rather than evidencing confusion, the drafting history of Article 3, including the Minutes of the session at which it was discussed, indicate a deliberate decision by the delegates not to make the statement "compulsory" in Article 3 in spite of the Japanese proposal.

In the face of this overwhelming evidence, petitioners and the Solicitor General nevertheless argue that the drafters intended to impose the Article 3(2) sanction if the ticket fails to include the "particular" of the Article 3(1)(e) "statement." There is absolutely no support for such argument[14] to be found in the drafting history of the Convention. The drafting history of Article 3 only supports the contrary position, *viz*, the drafters intended to and expressly did limit the application of the Article 3(2) sanction to nondelivery.

2. Examination of Article 3 in the Broader Context of Other Provisions of the Warsaw Convention Regarding Transportation Documents Confirms the Limited Application of the Article 3(2) Sanction

Comparison of the unamended Warsaw Convention provisions regarding transportation documents (passenger

[14] Petitioners' cite to Reporter De Vos' comment regarding ensuring that the ticket indicates that the carriage is "international carriage" (Petitioners' Brief at 34-35) as support for their argument that the treaty sanction under Article 3 applies if the "statement" is omitted (which it was not from the subject KAL passenger tickets). The comment merely confirms that the carriers should be strict in providing the particulars even though the incentive of treaty sanction in the absence of particulars was eliminated. This comment does not controvert the clear meaning of Article 3.

ticket, baggage check and air waybill) further emphasizes the treaty drafters' intent to apply the sanction of unlimited liability *solely* for nondelivery of the passenger ticket. A highly significant difference exists between the provisions in Article 3, which specify the contents of the passenger ticket and delineate the circumstance under which unlimited liability will be imposed, and the corresponding provisions in Articles 4, 8 and 9 as to the baggage check and the air waybill governing the transportation of baggage and cargo.

Articles 3, 4 and 8 all specify the information to be included in the applicable transportation documents. The "statement" regarding the applicability of the Convention's liability rules is identical in Articles 3, 4 and 8. *See* 49 Stat. 3015-3017. (App. 3a-6a) Articles 3(2), 4(4) and 9 all impose the sanction of unlimited liability if the applicable documents are not delivered or made out. However, *only* Articles 4(4) and 9 also apply the sanction of unlimited liability if the baggage check and air waybill fail to contain certain particulars, one of which is the "statement" that the carriage is subject to the Convention's liability rules. *Id.* A comparison of Articles 4(4) and 9 with Article 3(2) confirms "that delivery of a ticket suffices to limit the carrier's liability with respect to passengers even if the ticket does not contain the" Article 3(1)(e) statement. *Stratis* v. *Eastern Air Lines*, 682 F. 2d 406, 411 (2d Cir. 1982);[15] *see also Grey* v. *American Airlines*, 95 F. Supp. 756, 758 (S.D.N.Y. 1950), *aff'd*, 227 F.2d 282 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956).

A comparison of the drafting history of Articles 4, 8 and 9, with the drafting history of the passenger ticket provisions in Article 3, confirms beyond question that Article 3, as finally adopted, reflects the clear intent of the Convention's drafters to apply the unlimited liabil-

[15] In the next paragraph of the *Stratis* opinion, however, the Second Circuit ignored this distinction and, following the erroneous *Lisi* decision, rejected "a literal reading of Article 3(2)'s requirement of mere delivery of a ticket." 682 F.2d at 411.

ity sanction *only* for nondelivery of the passenger ticket. *See Saks*, 470 U.S. at 399 (the Court must look to the "expectations" of the "continental jurists").[16] Article 4, as originally drafted and forwarded to Warsaw by CITEJA, imposed the treaty sanction only if the baggage check was missing certain particulars, none of which was the "statement." *See* Solicitor General's Brief at App. 84a-87a; Horner, *Warsaw Minutes* at 259. (J.A. 183-184) At the Conference in Warsaw, however, immediately after the discussion regarding Article 3, the "statement" on the baggage check required by Article 4 was made a compulsory "particular" the omission of which subjected the carrier to unlimited liability. *See* Horner, *Warsaw Minutes* at 155-156. (J.A. 153-154) The final version of Article 9 (even as originally drafted as Article 18) provided that the carrier would be subject to unlimited liability if the air waybill failed to contain the required "particulars" *and* the "statement." *See* Solicitor General's Brief at App. 88a-90a.

The *deliberate inclusion* in Articles 4 and 9 of the "statement" as a compulsory "particular," the omission of which subjects the carrier to unlimited liability, was directly contrary to the *deliberate deletion* of the treaty sanction in Article 3 for omission of any or all of the paragraph 1 "particulars" including the Article 3(1)(e) "statement."

The Solicitor General's speculation that this deliberate redrafting of the CITEJA draft convention was unintended (Solicitor General's Brief at 21) is belied by Mr. De Vos' Report "[o]n the subject of compulsory particulars" in Article 4. Horner, *Warsaw Minutes* at 156. (J.A. 154) Following discussion of Article 3, Mr. De Vos reported that the drafting committee "retained the same sanction" in Article 4 as drafted by CITEJA, but reduced the compulsory particulars to only: (d) the number of the pas-

[16] It was consistent with the then existing state of European law that the drafters did not impose unlimited liability if an air carrier failed to include the statement in the passenger ticket. *See* discussion, *supra* at 12-13 n.8.

senger ticket, (f) the number and weight of the packages and (h) the "statement." *Id.* Mr. de Vos specifically noted that the "last paragraph [of Article 4] *was not modified* like Article 3" to delete the treaty sanction for the omission of the listed particulars in the passenger ticket (emphasis added). *Id.*

The drafting history of Articles 3, 4 and 9 clearly refutes petitioners' argument that the parties intended the treaty sanction for omission of the Article 3(1)(e) statement to be inferred in Article 3(2), because this sanction was *included expressly* in Articles 4 and 9 and never was made applicable to Article 3.

3. The Drafting History of the 1955 Hague Protocol Confirms Conclusively that Article 3(2) of the Warsaw Convention Applies Only to Nondelivery of the Passenger Ticket

In 1955, the parties to the Warsaw Convention agreed to certain amendments to the treaty as set forth in The Hague Protocol. *See* Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Done at The Hague on 28 September 1955, 478 U.N.T.S. 371 [The Hague Protocol]. (J.A. 207-244) Although The Hague Protocol never has been ratified by the United States,[17] the amendments to Article 3 proposed by the United States and adopted at the Conference confirm that the Warsaw Convention limits imposition of the Article 3(2) sanction to nondelivery of the passenger ticket.

At The Hague, the delegates considered various proposals to amend the Article 3(1)(e) "statement" to provide "notice" to passengers of the carrier's limited li-

[17] *See* S. Exec. Rep. No. 3, 89th Cong., 1st Sess. (1965); S. Exec. Doc. H., 86th Cong., 1st Sess. (1959); Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 504-516 (1967) [Lowenfeld, *The Warsaw Convention*].

ability under the Convention and also to provide a sanction of unlimited liability for failure to provide such "notice." *See* I & II ICAO, *International Conference on Private Air Law*, Minutes (1955), The Hague [The Hague Minutes]. (J.A. 207-230; App. 19a-25a) The United States draft proposal in particular read as follows:

> In Article 3—
>
> (a) Paragraph 1 shall be deleted and replaced by:
>
> "(1) For the carriage of passengers a ticket shall be delivered containing the following particulars:
>
> • • •
>
> (d) The statement set forth below, printed in a color which contrasts with the other printing and with the ticket stock:
>
> '*Advice to International Travellers* (in letters not less than ½ centimeter high)
>
> Travellers embarking upon a journey involving an ultimate destination or stop in a country other than the country of origin are advised that the Warsaw Convention may be applicable to their journey. The Convention governs the liability of carriers to passengers and shippers and limits liability for personal injury or death in most cases to—Poincare gold frances'."
>
> (b) Paragraph 2 shall be deleted and replaced by:
>
> "(2) The passenger ticket shall constitute *prima facie* evidence of the conclusion and conditions of the contract of carriage. . . . Nevertheless if the carrier accepts the passenger without a passenger ticket having been delivered *or if the ticket does not include*

> *the statement in the form required by Paragraph (1) relating to the applicability of the Convention he shall not be entitled to avail himself of any of the defenses which exclude or limit his liability.*"

The Hague Minutes, II, ICAO at 243 (emphasis added). (App. 24a-25a)

In response to the United States proposal, the delegates at The Hague agreed to *amend* Article 3(1)(e) of the Convention to replace the "statement" with an explicit "notice" as to the carrier's limited liability. Thus, the amended Article 3 as adopted at The Hague, provides for inclusion in the passenger ticket of:

> c) *a notice* to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and . . . in most cases limits the liability of carriers for death or personal injury . . .

and, with respect to the sanction, provides:

> Nevertheless, if, with the consent of the carrier, the passenger embarks without a passenger ticket having been delivered, or *if the ticket does not include the notice required by paragraph 1 c) of this Article, the carrier shall not be entitled to avail himself of the* [limitation of liability] *provision of Article 22.*

The Hague Protocol, Article 3(1)(c) (emphasis added). (J.A. 253 & 255)

It is self-evident that the United States proposed the amendment because unamended Article 3(2) did not impose such a sanction.

The discussions at The Hague confirm that the delegates clearly understood that unamended Article 3(2) imposes the treaty sanction of unlimited liability *only* if the carrier fails to deliver a ticket to the passenger. For

example, in responding to the French Delegate's remarks in favor of the amendment to Article 3 drafted in Rio de Janeiro,[18] the representative of the International Union of Aviation Insurers and the International Chamber of Commerce stated that "the Convention, unlike the [Rio] Protocol, did not impose a sanction on the carrier for failure to include the statement concerning liability." The Hague Minutes, I, ICAO at 81 (App. 22a); *see also* The Hague Minutes, I, ICAO at 66. (App. 19a-21a)

The Italian Delegate noted:

> . . . According to the text of the old Convention there was a sanction only in the case where the passenger ticket had not been delivered, while, in the case of the Protocol, there were two instances in which the carrier might have unlimited liability: where he accepted a passenger without a passenger ticket having been delivered and if the ticket did not include the statement that the carriage was subject to the rules relating to liability established by the Convention. Beyond doubt, the text of the old Convention was more favourable to the carrier than the Protocol.

The Hague Minutes, I, ICAO at 84. (App. 23a)

The German Delegate specifically opposed the inclusion of a sanction for failure to include the "notice" (as redrafted by the delegates) on the passenger ticket, positing:

> Suppose a ticket agent issued an old form of ticket which did not contain the notice. Was that a reason for exposing the carrier, who had not, himself, issued the ticket, to unlimited liability?

The Hague Minutes, I, ICAO at 127. (J.A. 219)

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[18] The Legal Committee of ICAO drafted amendments to the Warsaw Convention in Rio de Janeiro in 1953. Lowenfeld, *The Warsaw Convention*, 80 Harv. L. Rev. at 505. The sanction provision of Article 3 drafted in Rio, which also was under consideration at The Hague Conference, is virtually identical to the United States proposal.

The delegates accepted the United States proposal to amend Article 3(2) to *extend* the sanction of unlimited liability to situations where the passenger ticket does not contain the newly specified "notice." Comparison of the unamended Article 3 "statement" ("l'indication") with The Hague Protocol "notice" ("avis") further demonstrates the fallacy of petitioners' argument that the unamended Article 3(1)(e) "statement" was intended to be a notice.[19] Article 3(2) as amended by The Hague Protocol—unlike the original Article 3(2) at issue herein—provides that the carrier will not be entitled to the Convention's limitation of liability if "the passenger embarks without a passenger ticket having been delivered, *or if the ticket does not include the notice required by paragraph 1(c) of this Article.*" The Hague Protocol, Article 3(2) (emphasis added) (J.A. 255)

This amendment to Article 3 compels the conclusion that the new "notice" requirement of amended Article 3(1)(c) and the sanction imposed by amended Article 3(2) for failure to provide this "notice" were not then, and are not now, part of unamended Article 3 of the Warsaw Convention. The United States would have had no reason to advocate superfluous amendments to the Warsaw Conven-

[19] Adoption of these amendments confirms that the "statement" in the original, unamended Article 3(1)(e) is not the equivalent of the "notice" or warning contained in amended Article 3(1)(e). *See Montreal Trust Co.* v. *Canadian Pacific Airlines Ltd.*, 72 D.L.R. 3d 257, 263 (Canada 1976) (notice required by The Hague Protocol and the statement required by the Convention "are . . . two completely different requirements with radically different effects"). (App. 41a-51a) The statement never was intended as a notice requirement, but rather as a "clause paramount" in keeping with other transportation conventions adopted prior to the Warsaw Convention. Such a statement, or "clause paramount", is intended to function as a choice of law provision, ensuring that the Convention will be applied by a state not a party thereto. *See* Drion, *Limitation of Liabilities* at 305-306; *Hurry On* (*Vita Food Products* v. *Unus Shipping Co.*), [1939] A.M.C. 257, [1939] A.C. 277 (Eng. P.C.). A similar provision exists in the United States Carriage of Goods by Sea Act, 46 U.S.C. § 1312. *See* Gilmore & Black, *Law of Admiralty* 145, 185 (2d ed. 1975).

tion if the substance of the proposed amendments already existed in the original terms of the unamended Convention. Thus, at The Hague Conference, the United States and other participating governments correctly understood unamended Article 3 to have a meaning diametrically opposed to the interpretation presently urged by petitioners and the Solicitor General.

As explained by Professor H. Drion, The Netherland's Delegate to the 1955 Hague Conference, with respect to the clear understanding of the parties to the unamended Convention:

> Both the wording of Article 3(2), when compared with that of Articles 4(4) and 9, and the history of the provision make it abundantly clear that the framers of the Convention meant to impose the sanction with respect to the ticket *only* in case of a complete failure to deliver a ticket, and did *not* want to attach the sanction to the omission of the prescribed particulars.

Drion, *Limitation of Liabilities* at 300 (emphasis added); *see also* Goedhuis, *National Airlegislations and the Warsaw Convention* at 156-157 (1937) (prior to becoming President of The Hague Conference, Mr. Goedhuis explained that in cases involving delivery of the passenger ticket, unlike delivery of the baggage check, the carrier is not deprived of limited liability under unamended Article 3(2) if the delivered ticket omits the particulars specified in Article 3(1)).

In summary, the plain language of Article 3, the context in which Article 3(2) appears in the unamended Warsaw Convention, the intent of its drafters as evidenced by the drafting history of the Convention, and the understanding of the signatories as evidenced by The Hague Protocol amendments, all compel the conclusion that the sanction of unlimited liability can be imposed under unamended Article 3 *only* for failure to deliver a passenger ticket. The imposition of the treaty sanction for failure of a delivered ticket to contain the Article 3(1)(e) statement in any type

size would be contrary to the wording of the treaty, the intent of its drafters and the understanding of the signatories, including the United States. The KAL tickets were delivered and the tickets contained the Article 3(1)(e) statement. The Court below correctly held that the Article 3(2) sanction of unlimited liability did not apply.

D. *A Judicially Desired "Adequate Notice" Requirement Cannot Be the Basis for the Imposition of Unlimited Liability*

In the face of this overwhelming evidence, petitioners nevertheless argue that the Article 3(2) sanction should be stretched to encompass a situation where a delivered passenger ticket includes the Montreal Advice in 8 rather than 10 point type size. Petitioners, in support of their argument, rely upon two abberant decisions of the United States Court of Appeals for the Second Circuit. *See Lisi* v. *Alitalia-Linee Aeree Italiane*, 253 F. Supp. 237 (S.D.N.Y.), *aff'd*, 370 F.2d 508 (2d Cir. 1966), *aff'd by an equally divided Court*, 390 U.S. 455 (1968) [*Lisi*][20] and *In re Air Crash Disaster at Warsaw, Poland, on March 14, 1980*, 705 F.2d 85 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983) [*LOT*].

In *Lisi*, the Second Circuit disregarded the unequivocal language of Article 3(2) and the intent of its drafters and held that the treaty sanction of unlimited liability should be imposed if the delivered passenger ticket fails to give "adequate notice" of the applicability of the Convention's liability limitations. The *Lisi* court held that a delivered passenger ticket can be deemed to have been "constructively nondelivered" if it does not contain this judicially desired "adequate notice." *Lisi*, 370 F.2d at 511.[21] Thus,

[20] The affirmance of *Lisi* by an equally divided Court is of no precedential value because the Court does not pass on an issue upon which it is equally divided. The judgment of the lower court simply remains in effect. *See Hertz* v. *Woodman*, 218 U.S. 205, 213-214 (1910); *Durant* v. *Essex Co.*, 74 U.S. (7 Wall.) 107 (1868).

[21] In *Lisi*, the Court found that adequate notice had not been given because the Article 3(1)(e) statement as to the Conven-

(footnote continued on following page)

the *Lisi* court grafted upon the unambiguous Article 3 treaty language a judicially created requirement of "adequate notice" and a concept of "constructive non-delivery of the passenger ticket" to circumvent what the *Lisi* court perceived to be the Warsaw Convention's unacceptable limitation of the carrier's liability.[22] As was so aptly stated by Circuit Judge Moore in his dissenting opinion in *Lisi:* "The majority do not approve of the terms of the treaty and, therefore, by judicial fiat they rewrite it." *Lisi*, 370 F.2d at 515 (Moore, J., dissenting).

The Second Circuit in *LOT*, again motivated by judicial distaste for the treaty's liability limitation, relied on the

(footnote continued from previous page)

tion's applicability, which was printed in 4 point type, was "camouflaged in Lilliputian print." *Lisi*, 370 F.2d at 515. After *Lisi*, 8 point type size has been held to constitute adequate notice under *Lisi*. *See, e.g., Millikin Trust Co.* v. *Iberia, Lineas Aereas de Espana*, 11 Av. Cas. (CCH) 17,331, 17,332 (N.Y. Sup. Ct. 1969), *aff'd mem.*, 36 A.D.2d 582 (N.Y.A.D. 1971).

[22] The *Lisi* decision was the last in a trilogy of cases in which increasing importance was placed upon the passenger's knowledge of the Convention's liability limitations. In *Mertens* v. *Flying Tiger Line*, 341 F.2d 851 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965), the Second Circuit found that physical delivery of a ticket after the passenger had boarded the aircraft constituted nondelivery under Article 3(2). In *Warren* v. *Flying Tiger Line*, 352 F.2d 494, 498 (9th Cir. 1965), the Ninth Circuit agreed with *Mertens* and held that "delivery of the passenger ticket [must] be made sufficiently in advance of the flight so that the passenger may, if he desires, obtain additional insurance protection." Finally, in *Lisi*, the Second Circuit held that Article 3 required delivery of a ticket containing a noticeable and readable warning of the applicability of the Convention's liability rules; otherwise the purpose for requiring timely delivery, enunciated in *Mertens* and *Warren*, would be defeated. *Lisi*, 370 F.2d at 513. As the District Court below correctly held, however, "[w]hile it is not surprising that an American court would find it necessary that notice, once required, be given 'in such a manner as to afford [the passenger] a reasonable opportunity to take self-protective measures,' a notice requirement is nowhere within the treaty nor is the Article 3(1)(e) statement linked with the limitation." *Korean Air Lines Disaster*, 664 F. Supp. at 1473. (J.A. 406-407)

Lisi court's "adequate notice" characterization of Article 3 and held that the Montreal Agreement type size specification for the Montreal Advice somehow served to amend Article 3(2). *LOT*, 705 F.2d at 89. Thus, the Second Circuit in *LOT* compounded its error in *Lisi* by holding that the Warsaw Convention's sanction of unlimited liability applies if the carrier delivers a passenger ticket which contains the Montreal Advice printed in anything less than 10 point type size.

The erroneous conclusion in *Lisi* clearly was based upon the *Lisi* court's distaste for the Convention's liability limitation, which was perceived as a "one-sided advantage" enjoyed by the carrier. *Lisi*, 370 F.2d at 513.[23] Ignoring the presumption of air carrier liability prescribed by Article 17, characterizing the liability limitation as "arbitrary" and emphasizing that the treaty limitation has been criticized, the *Lisi* court held, *without citation to any authority whatsoever*, that the "*quid pro quo*" for this "one-sided advantage" is delivery to the passenger of a ticket which gives adequate notice "that recovery is limited very substantially." *Lisi*, 370 F.2d at 513.

The alleged *quid pro quo* upon which the *Lisi* decision is based is incorrect. From the time that the United States adhered to the Convention, it consistently has been recognized that the *quid pro quo* for the Article 22 limitation is the Article 17 presumption of carrier liability. *See* Letter from Secretary of State Cordell Hull to President Franklin D. Roosevelt (Mar. 31, 1934), *reprinted in* [1934] U.S. Av. Rep. 240; *see also LOT*, 705 F.2d at 87; *MacDonald* v. *Air Canada*, 439 F.2d 1402, 1405 (1st Cir. 1971); *Block* v. *Compagnie Nationale Air France*, 386 F.2d 323, 327 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968).

[23] The Second Circuit, however, has not exhibited the same judicial distaste for the Convention's liability limitation with respect to baggage and cargo. *See Republic National Bank of New York* v. *Eastern Airlines*, 815 F.2d 232 (2d Cir. 1987); *Exim Industries* v. *Pan American World Airways*, 754 F.2d 106 (2d Cir. 1985).

As the District Court correctly explained:

> [I]t has generally been agreed that the *quid pro quo* for the limitation is, not notice, but [a rebuttable presumption of] liability without fault. . . . There is no evidence that the treaty drafters and signatories intended "adequate notice" to affect the operation of the treaty limitation.

Korean Air Lines Disaster, 664 F. Supp. at 1474. (J.A. 409)

Relying on this erroneous *quid pro quo*, the Second Circuit in *Lisi* indulged "in judicial treaty making" and rewrote the plain terms of the treaty. *Lisi*, 370 F.2d at 515 (Moore, J. dissenting). In so doing, the *Lisi* court failed to adhere to the rule of treaty construction "to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Saks*, 470 U.S. at 399.

The "adequate notice" and "constructive nondelivery" principles, which the *Lisi* court incorrectly added to the explicit Article 3(2) treaty sanction, derive from common law rules regarding contractual limitations of liability. The *Lisi* decision injects into an international treaty American common law rules, which make it "essential that notice [of limitation of liability] be adequately given before or at the time of the making of the contract." Miller, *Liability in International Air Transport* at 85.[24] As the District Court noted, because the limitation was viewed by the Second Circuit as "an alarming prospect for any

[24] Incorporation of common law contractual "adequate notice" principles, however laudable, has no place in the proper interpretation of a multilateral treaty such as the Warsaw Convention. Where the passenger ticket provides for transportation between certain designated termini, the provisions of the Convention have automatic and full impact on the rights of the parties. *See, e.g., Benjamins* v. *British European Airways*, 572 F.2d 913, 914 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979). Accordingly, in interpreting the Warsaw Convention, "purely contractual rules, *e.g.* the requirement that a limitation clause be accepted by both parties, are not relevant." Miller, *Liability in International Air Transport* at 88.

passenger to face, it is not surprising [that the Second Circuit then decided] that the standard for permitting the limitation to stand and for protecting the passenger against the limitation became strict notice of the limitation." *Korean Air Lines Disaster*, 664 F. Supp. at 1473. (J.A. 407) By requiring "adequate notice" where the treaty does not, the Second Circuit simply but erroneously "managed to sidestep the limitation" and provide unlimited recovery from the carrier without proof of fault. *Korean Air Lines Disaster*, 664 F. Supp. at 1473. (J.A. 407)

By incorrectly incorporating American common law principles into the Convention, the *Lisi* court not only violated the duty of the judiciary to enforce the clear and unambiguous terms of the treaty as written, but also destroyed the international uniformity of decision which the Warsaw Convention was designed to achieve. Outside the United States, only failure to deliver a passenger ticket will give rise to imposition of the unamended Article 3(2) treaty sanction of unlimited liability. *See Ludecke* v. *Canadian Pacific Airlines*, 98 D.L.R.3d 52 (Canada 1979) (App. 29a-40a); Miller, *Liability in International Air Transport* at 88 (discussing a French court's "forceful rejection" of *Lisi* in *Canale* v. *Air France*, (France 1972) 35 R.G.A.E. 186 (Trib. gr. inst. Ajaccio, 25 Nov. 1971).[25]

The *Lisi* interpretation of Article 3(2) was soundly rejected by the Supreme Court of Canada, the highest court of one of the signatories to the Warsaw Convention. *Ludecke*, 98 D.L.R.3d at 57-58. (App. 36a-37a) In *Ludecke*, the Supreme Court of Canada refused to follow *Lisi* and, abiding by the plain language of the treaty and the intent of its drafters, held:

[25] In addition, seven signatories to the Convention officially advised the United States that the decision in *Lisi* was *contrary* to their agreement with the United States as expressed in the Convention. *See Alitalia-Linee Aeree Italiane* v. *Lisi*, No. 67-70 (1968) (Reply Brief of Petitioner to the Memorandum for the United States as *Amicus Curiae* at 2). (J.A. 290-291) *See Saks*, 470 U.S. at 404 (in interpreting the provisions of the Warsaw Convention, "the opinions of our sister signatories [are] entitled to considerable weight").

> The benefit of the limitation will be lost only where no ticket is delivered. The American cases referred to above [including *Lisi*] which hold that delivery of a ticket with an irregularity, that is, a statement as required by art. 1[sic](e) which is illegible, amounts to no delivery of a ticket, ignore this plain language and fail to give the effect to a precise statement of the law. I am unable, however harsh and unreasonable I may consider the limitation, to adopt the American test. It is clear in this case that the carrier delivered a ticket and thus preserved its right to the limitation.

Ludecke, 98 D.L.R.3d at 57-58. (App. 37a).

The Court of Appeals below correctly refused to perpetuate further the judicial treaty rewriting indulged in by the Second Circuit in *Lisi* and extended by *LOT*. The decision in *Lisi* was wrong when rendered and it is wrong today. The Court should affirm the decision of the Court of Appeals below and reject the *Lisi* and *LOT* decisions as incorrect.

II

Delivery of a Passenger Ticket With the Montreal Advice in 8 Point Type Size Is Not a Basis for Imposing the Treaty Sanction of Unlimited Liability

A. *The Montreal Agreement Cannot and Does Not Amend the Warsaw Convention to Extend the Article 3(2) Sanction to Cases Where the Delivered Passenger Ticket Contains the Montreal Advice in 8 Point Type Size*

The Warsaw Convention is a treaty of the United States and as such is the supreme law of the land. U.S. Const. art. VI, cl. 2. *See also United States* v. *Pink*, 315 U.S. 203 (1942); *Bacardi Corp. of America* v. *Domenech*, 311 U.S. 150 (1940); *United States* v. *Belmont*, 301 U.S. 324 (1937). On the national level, a treaty of the United States may be abrogated only by a subsequent and superceding treaty or by an Act of Congress. *See Trans World Airlines* v.

Franklin Mint Corp., 466 U.S. 243, 252 (1984); *Cook* v. *United States*, 288 U.S. 102, 120 (1933). On the international level, a multilateral treaty such as the Warsaw Convention may be amended only by agreement between the sovereign states that are parties to the treaty. *See* Article 39, Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, *reprinted in* 63 Am. J. Int'l L. 875, 887 (1969) (entered into force Jan. 27, 1980) [Vienna Convention].[26]

The Montreal Agreement is not an agreement among sovereign states but is merely a private agreement among air carriers filed with the DOT pursuant to DOT Economic Regulation Parts 203 and 213 (14 C.F.R. §§ 203 & 213). *See Air France* v. *Saks*, 470 U.S. 392, 406 (1985). Thus, the Court's "duty to enforce" the terms of the Warsaw Convention "cannot be circumvented by reference to the Montreal Agreement of 1966." *Saks*, 470 U.S. at 406; *see also Cook* v. *United States*, 288 U.S. 102 (1933); *Johnson* v. *Browne*, 205 U.S. 309 (1907); *Reed* v. *Wiser*, 555 F.2d 1079, 1093 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977).

In *Air France* v. *Saks*, 470 U.S. 392, 395 (1985), the question before the Court was "whether a loss of hearing proximately caused by normal operation of the aircraft's pressurization system is an 'accident' within the meaning of Article 17 of the Warsaw Convention." Respondent Saks

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[26] Although the United States is not a party to the Vienna Convention, the Vienna Convention has been recognized by the Court as an authoritative statement of international law. *See Weinberger* v. *Rossi*, 456 U.S. 25, 29 n.5 (1982); [1974] *Digest of United States Practice in International Law* 198 (1975) ("The Vienna Convention . . . is generally regarded as reflecting current international law on the subject . . ."); *see also Paquete Habana*, 175 U.S. 677 (1900) (International law is to be applied by the federal courts in appropriate cases.).

Because a treaty is an agreement "concluded between states," it may be amended only by the nation state participants. Vienna Convention, Article 2(1)(a) & (g) *reprinted in* 63 Am. J. Int'l L. at 876; *see also Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979) (a treaty is essentially a contract between or among sovereign nations).

attempted to persuade the Court that Air France should be held absolutely liable based upon the Montreal Agreement waiver of the "all necessary measures" defense under Article 20(1) of the Convention. 49 Stat. 3019. (App. 6a) The Court, recognizing that the "inquiries" with respect to the "accident" requirement under Article 17 "may on occasion be similar" to the "inquiries" with respect to the available defenses under Article 20(1), nevertheless "decline[d] to employ that similarity to repeal a treaty provision [Article 17] that the Montreal Agreement *on its face left unaltered.*" *Saks*, 470 U.S. at 407 (emphasis added). Similarly, in this case the Court should decline to amend, extend or repeal Article 3(2) of the Warsaw Convention which the Montreal Agreement "on its face left unaltered."

The Montreal Agreement reads as follows:

AGREEMENT

The undersigned carriers (hereinafter referred to as "the Carriers") hereby agree as follows:

1. Each of the Carriers shall effective May 16, 1966, include the following in its conditions of carriage, including tariffs embodying conditions of carriage filed by it with any government:

> The Carrier shall avail itself of the limitation of liability provided in the [Warsaw] Convention . . . However, in accordance with Article 22(1) of said Convention . . . the Carrier agrees that, as to all international transportation by the Carrier as defined in the said Convention . . .
>
> (1) The limit of liability for each passenger for death, wounding, or other bodily injury shall be the sum of US $75,000 inclusive of legal fees and costs. . . .
>
> (2) The Carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail it-

self of any defense under Article 20(1) of said Convention. . . ."

2. Each carrier shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention . . . the following notice, which shall be printed in type at least as large as 10 point modern type and in ink contrasting with the stock on (i) each ticket . . .:

"ADVICE TO INTERNATIONAL PASSENGER ON LIMITATION OF LIABILITY

* * *

Montreal Agreement. (App. 9a-10a)

Under the Montreal Agreement, therefore, with respect to any "international transportation" (as defined in Article 1(2) of the Warsaw Convention) that includes a point in the United States, the participating carriers agreed:

1. to insert in their tariffs a provision agreeing to a limit of liability of $75,000 per passenger, a "special contract" under Article 22(1) of the Convention;[27]

2. to waive the "all necessary measures" defense available under Article 20(1) of the Warsaw Convention (*Saks*, 470 U.S. at 407); and

3. to furnish an "Advice to International Passenger on Limitation of Liability," to be "printed in type at least as large as 10 point modern type" on the ticket, or on a paper placed in the ticket envelope or on the ticket envelope.[28]

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[27] Article 22(1) provides that "by special contract, the carrier and the passenger may agree to a higher limit of liability." 49 Stat. 3019. (App. 7a) "Since the agreement is expressly stated to be a special contract under Article 22(1) of the Warsaw Convention, it incorporates all the other provisions of the Convention." Lowenfeld, *The Warsaw Convention*, 80 Harv. L. Rev. at 597.

[28] There is no requirement that paragraph 2 of the Montreal Agreement, which contains the Montreal type size requirement, be

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As petitioners acknowledge, the Montreal Agreement makes no provision for any sanction for a failure to comply with any of its provisions, including the type size specification of the Montreal Advice. *See In re Korean Air Lines Disaster of September 1, 1983*, MDL No. 565 (Transcript of Hearing at 11, D.D.C. Feb. 28, 1985). (J.A. 333) The District Court recognized that, "[a]bsolutely nothing is said [in the Agreement] to indicate that waiver of the limitation was contemplated." *Korean Air Lines Disaster*, 664 F. Supp. at 1466. (J.A. 392)[29]

In addition to the absence of any language in the Montreal Agreement waiving the limitation for noncompliance with the type size specification, the history of the Montreal Agreement is devoid of evidence that any significance was attached to the 10 point type size specification or that failure to comply with the specification was intended to result in unlimited liability.[30]

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incorporated into an airline's tariffs. Consequently, the type size provision does not constitute any part of the passenger/carrier contract. Additionally, DOT Economic Regulation Part 203.4(c) specifically provides that participation in the Montreal Agreement constitutes a "special agreement between the carrier and its passengers" only with respect to the increase in liability to $75,000 under Article 22(1) and waiver of the all necessary measures defense under Article 20(1), but not with respect to the 10 point type size requirement. *See* 14 C.F.R. § 203.4(b) & (c). (App. 15a) For these reasons, petitioners' argument that KAL is "contractually bound" to provide the passengers with "the Article 3 warning in large print" is simply incorrect. *See* Petitioner's Brief at 18.

[29] Prior to publication at 664 F. Supp. 1463, 1466, the District Court's slip opinion was slightly different than the opinion as published and read: "Contrary to the view that waiver of the limitation [of liability] was contemplated, the Montreal Agreement was entered into to *preserve* the limitation." (emphasis in original) (J.A. 392)

[30] The Montreal Agreement does not define or specify what is meant by "10 point modern type" and no specific type face (as distinguished from type size measured by lines per inch) is described by that phrase. The type face used for the Montreal Advice in the KAL passenger tickets delivered to petitioners'

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To support their argument that a carrier should be subject to the Article 3(2) treaty sanction of unlimited liability for failure to comply with one of the provisions of the Montreal Agreement, petitioners rely, as did the Second Circuit in *LOT*, upon a fictional "historical and functional relationship" between the Montreal Agreement and the Warsaw Convention. *See* Petitioners' Brief at 15-23; *LOT*, 705 F.2d at 90. Petitioners base this fictional "historical and functional relationship" argument, as did the Second Circuit in *LOT*, upon the erroneous conclusion that adequacy of notice was one of the concerns that led to the filing of the Notice of Denunciation of the Warsaw Convention by the United States in November of 1965. *See* Petitioners' Brief at 24; *LOT*, 705 F.2d at 89-90.

The Montreal Agreement arose out of the unsuccessful attempts[31] by the United States to obtain the consent of the adhering nations to amend the Warsaw Convention to increase the Article 22 limit of liability to a minimum of $100,000 per passenger. The United States ultimately recognized that it would not be able to achieve by treaty amendment what it considered to be a meaningful increase in the limitation of liability and filed a Notice of Denunciation of the Warsaw Convention with the Polish People's Republic on November 15, 1965, to be effective six months hence. *See Franklin Mint Corp.*, 466 U.S. at 282 n.22 (1984) *(citing* Lowenfeld, *The Warsaw Convention*, 80 Harv. L. Rev. at 546-552). The Notice of Denunciation, in pertinent part, stated:

> The United States of America wishes to state that it gives this notification *solely because of the low limits of liability for death or personal injury provided in the Warsaw Convention,* even as those limits would be increased by the Protocol to amend the Convention done at The Hague on September 28, 1955.
>
> . . . . [T]he United States of America stands ready to participate in the negotiation of a revision of the Warsaw Convention which would provide substantially higher limits, or of a convention covering the other matters contained in the Warsaw Convention and Hague Protocol but without limits of liability for personal injury or death.

U.S. DEP'T OF STATE, PRESS RELEASE No. 268 at 2, 50 Dep't State Bull. 923 (1965) (emphasis added). (J.A. 280)

In response to this Notice of Denunciation, delegates from 59 nations and representatives of the major international air carriers convened in Montreal.[32] Lowenfeld, *The Warsaw Convention*, 80 Harv. L. Rev. at 563-575, 586-602. The only topics discussed in detail at the Montreal Conference were the level to which the limit of liability should be raised and whether absolute liability to passengers should be imposed. *Id.*

Significantly, and contrary to petitioners' assertion, the record of the proceedings in Montreal is devoid of any evidence that the United States connected the imposition of absolute but limited liability with any form of notice of the limitation. In fact, in an attachment to a United States Government Memorandum, the FAA, in preparation for the Montreal Conference, concluded that if the United States were able to obtain the consent of the participating nations to increase the limit of liability *and* to the imposition of absolute liability upon the carriers, the

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decedents, while 8 point in type size, actually is larger and more readable than many of the specimen 10 point type faces recognized by the United States Government Printing Office. *See* Specimens of Type Faces, United States Government Printing Office (Wash. 1969). (J.A. 131-135)

[31] *See* Lowenfeld, *The Warsaw Convention*, 80 Harv. L. Rev. at 532-552.

[32] The United States' leading international air carriers previously had convened at the request of the State Department to discuss ratification of The Hague Protocol by the Senate. At the meeting, the carriers were advised that unless they volunteered to raise the Warsaw limit to $100,000 per passenger, the State Department would proceed with denunciation of the Convention. *See* Lowenfeld, *The Warsaw Convention*, 80 Harv. L. Rev. at 547.

position of the passenger vis-a-vis the carrier would be "roughly balanced." United States Government Memorandum, FAA Proposal at 3 (Jan. 10, 1966). (App. 56a)

Although the Montreal Conference ended in failure, the United States did obtain agreement of participating carriers to increase the limit of liability to $75,000 per passenger "on a journey to, from, or with an agreed stopping place in the United States." Montreal Agreement. (App. 10a) As a result, on May 14, 1966, the United States withdrew its Notice of Denunciation of the Convention. U.S. DEP'T OF STATE, PRESS RELEASE No. 111, 54 Dep't State Bull. 955 (1966). (J.A. 283-284)

Contrary to the Solicitor General's repeated assertion that the United States withdrew the Notice of Denunciation as a result of the carriers' agreement to provide in 10 point type size a notice of the limitation of liability (Solicitor General's Brief at 11, 26), the Notice of Denunciation was withdrawn *solely* because the carriers had agreed to increase the limitation of liability to $75,000. The official withdrawal of the Notice of Denunciation in fact reads:

> At the time the notice under Article 39 was submitted, the United States Government stated that *that action was taken solely because of dissatisfaction with the low limits of liability* for death or personal injury provided in the Convention, even as those limits would be increased by the Protocol to amend the Convention done at The Hague on September 28, 1955. Since that time, intensive negotiations among carriers and among governments have succeeded in establishing a new interim arrangement in accordance with Article 22(1) of the Convention. . . . —
>
> In view of the acceptance of this arrangement by the great majority of the world's international airlines, including all principal carriers serving the United States, the conditions which led the United States to serve its notice of November 15 have substantially changed. Accordingly, the United States of America believes that its continuing objectives of uniformity of international law and adequate protection for international air travelers will best be assured within the framework of the Warsaw Convention. . . .

U.S. DEP'T OF STATE, PRESS RELEASE No. 111, 54 Dep't State Bull. 955 (1966) (J.A. 283-284); *see also* PRESS RELEASE No. 110. (J.A. 281)

Clearly, the *sole* reason for denouncing the Convention was the United States' dissatisfaction with the low limit of liability. When the CAB approved the Montreal Agreement as the "basis upon which the United States could withdraw its notice of denunciation," the CAB reiterated that the Notice of Denunciation was given "*solely* because of the Convention's low limits of liability for personal injury or death to passengers." 31 Fed. Reg. 7302 (1966) (emphasis added). (J.A. 285) At no time did the United States ever state that "notice" of the limitation of liability was either a reason for denunciation or the withdrawal thereof.

While dissatisfaction of the United States with the limitation of liability was the *raison d'etre* for the Montreal Agreement,[33] the Agreement significantly is devoid of even the slightest indication that the drafters of this private intercarrier agreement considered that they effectively were amending Article 3(2) of the Warsaw Convention. As the District Court correctly noted during oral argument of petitioners' motion, the drafters of the Montreal Agreement certainly would not have neglected to specify "with great precision" any provision which affected the agreed higher limit of liability, especially its alleged un-

[33] The United States' continuing dissatisfaction with the "inadequate" limitation of even $75,000 per passenger under the Montreal Agreement is reflected in a June 24, 1988 letter from the Secretary of the Department of Transportation to the Honorable George Bush, President of the Senate in which the Secretary urges the Senate to "renew active consideration of Montreal Protocols 3 and 4" combined with a supplemental compensation plan providing for "*unlimited* recovery per passenger for economic damages, subject only to a per incident, per aircraft, limitation of $500 million." Letter from Secretary of Transportation to President of the Senate (June 24, 1988) (emphasis added). (App. 57a-61a)

availability in the event that the carrier failed to print the Montreal Advice in 10 point type size. *In re Korean Air Lines Disaster of September 1, 1983*, MDL No. 565 (Transcript of Hearing at 24, D.D.C. Feb. 28, 1985). (J.A. 341)[34]

As the District Court concluded:

> While it is indeed correct that the Montreal Agreement must be read in connection with the Warsaw Convention, the resulting Warsaw/Montreal system does not include delimiting liability for failure to provide the statement in 10-point type size. In short, the Montreal Agreement may not be read wholesale into the Warsaw Convention.

Korean Air Lines Disaster, 664 F. Supp. at 1476. (J.A. 413)

B. *DOT Economic Regulation Part 221 Cannot and Does Not Amend the Warsaw Convention to Extend the Article 3(2) Sanction to Cases Where the Delivered Passenger Ticket Does Not Contain the "Advice" in 10 Point Type Size*

Petitioners attempt to support their argument that the Montreal Agreement somehow amends the Warsaw Convention by reliance upon DOT (formerly CAB) Economic Regulation Part 221 (14 C.F.R. § 221.175(a)) which petitioners argue represents "an Executive Branch determination of minimum notice to the passenger." *See* Petitioners' Brief at 19. Even if the Montreal Agreement and the predecessor CAB Regulation could be read to amend the Convention, which they cannot *(see* discussion, *supra* at 33-34),

[34] Moreover, the only mention of type size in the history of the Montreal Agreement is a passing comment that "[o]n May 4 details of the arrangement (including a notice to each passenger in large type) were worked out in an all day negotiating and drafting session in Montreal." Lowenfeld, *The Warsaw Convention*, 80 Harv. L. Rev. at 594. The "large type" referred to is the 10 point modern type size specification ultimately adopted in the Montreal Agreement and previously used by the CAB in a regulation that the CAB proposed and promulgated approximately three years earlier. *See* 14 C.F.R. § 221.175(a) (App. 17a-18a)

there is absolutely no connection between the Regulation and the Article 3(2) sanction of the Warsaw Convention. Nor is there any indication in the Regulation or its history of an intent on the part of the United States to alter, amend or affect the scope of the treaty requirements of Article 3.

In 1963, the CAB issued a notice of proposal rule-making pursuant to its regulatory powers under Sections 204 (a), 401(e) and 403 (tariff filing provisions) and 411 (unfair competitive practices) of the Federal Aviation Act. *See* 49 U.S.C. §§ 1324(a) 1371(e), 1373 & 1381; *see also* 28 Fed. Reg. 3281-3283, 11775-11777 (1963). Specifically, the CAB created a new section to Part 221 of its Economic Regulations, effective February 1, 1964, entitled: "Special notice of limited liability for death or injury under the Warsaw Convention" which reads:

> (a) In addition to the aforesaid requirements of this subpart, each air carrier and foreign air carrier which, to any extent avails itself of the limitation on liability to passengers provided by the Warsaw Convention, shall, at the time of delivery of the ticket, furnish . . . the following statement in writing:
>
> ADVICE TO INTERNATIONAL PASSENGERS ON LIMITATION OF LIABILITY
>
> • • •
>
> . . . The statement prescribed herein shall be printed in type at least as large as 10-point modern type and in ink contrasting with the stock . . .
>
> • • •

14 C.F.R. § 221.175(a) (App. 17a-18a); 28 Fed. Reg. at 11777 (1963).[35]

[35] The Regulation also added a new paragraph to Part 221.38 which in pertinent part provided that "[u]nless the carrier elects to assume unlimited liability, its tariffs shall contain a statement as to the applicability and effect of the Warsaw Convention, including the amount of the liability limit in dollars. Where ap-

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In adopting this Regulation, the CAB made it clear that it was acting, not on the basis of the requirements of the Warsaw Convention, but rather in accordance with the CAB's statutory duty to regulate air transportation in the public interest pursuant to Section 102 of the Federal Aviation Act of 1958. *See* 49 U.S.C. § 1302. As the CAB stated when it proposed this Regulation, "the Board is of the view that the public interest requires an improved notice of the applicability and effect of the Convention and especially the amount of the carrier's limit of liability." *See* 28 Fed. Reg. 11775 (1963).

Nowhere in proposing or adopting Economic Regulation Part 221.175(a) did the CAB equate noncompliance with the Regulation to the Article 3(2) treaty sanction for failure to deliver a ticket. *See* 28 Fed. Reg. 11775-11777 (1963). To the contrary, the CAB clearly contemplated only a public law sanction under its enforcement powers for failure to comply with the Regulation. *Id.* at 11775 ("[I]mposition of the requirement by regulation . . . is required in the public interest . . . *to facilitate enforcement by the Board.*") (emphasis added).

Accordingly, while a carrier failing to comply with the Regulation may be subject to a civil penalty pursuant to 49 U.S.C. § 1471 or to a DOT enforcement action pursuant to 49 U.S.C. app. § 1487(a), there is no provision any law or regulation which authorizes imposition of the Article 3(2) treaty sanction for failure to comply with the type size specification of Economic Regulation Part 221.175(a). As the CAB advised the Court in the *Lisi* case, when promulgating this Regulation "the Board was *not* endeavoring

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plicable, a statement advising passengers of the amount of any higher limit of liability assumed by the carrier shall be added." 14 C.F.R. § 221.38(j) (App. 17a); 28 Fed. Reg. at 11777 (1963).

DOT Economic Regulation Part 221.38(j) as presently in force is identical to CAB Economic Regulation Part 221.38(j) as originally issued. Similarly, DOT Economic Regulation Part 221.175(a) as currently in force is identical, as pertinent herein, to CAB Economic Regulation 221.175(a) as originally issued.

to determine the requirements of the Warsaw Convention." *Alitalia-Linee Aeree Italiane* v. *Lisi,* No. 67-70 (1968) (Memorandum for the Civil Aeronautics Board as *Amicus Curiae* at 9) (emphasis added). (J.A. 297)[36]

Neither the Montreal Agreement nor Economic Regulation Part 221 amended or otherwise affected Article 3(2) of the Convention. No relationship exists, historical or otherwise, between the Article 3(2) treaty sanction and the Montreal Agreement type size specification (or its predecessor CAB Regulation) and no language in the Montreal Agreement authorizes the imposition of any sanction for failure to comply with its terms. Only Article 3(2) of the Convention provides the basis for the imposition of any sanction upon KAL and the sole requirement of Article 3(2)—delivery of the passenger ticket—has been met in this case.

C. *A Sanction of Unlimited Liability for Noncompliance With an Economic Regulation Should Not Be Created Judicially*

Petitioners incorrectly argue, based upon the Second Circuit's analysis in *LOT*, that the "Montreal Agreement established a separate liability regime." Petitioners' Brief at 22.

Acting on the *Lisi* theory that Article 3 requires "adequate notice" (*see* discussion, *supra* at 28-33), the Second Circuit in *LOT* determined that the Montreal Agreement requires that the perceived Article 3 "adequate notice" must be printed in 10 point type size. *LOT*, 705 F.2d at 89 ("Under the modifying terms of the Montreal Agreement, however, that statement must be in 10-point type".).

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[36] Because it is apparent from the history of Economic Regulation Part 221.175(a) that only CAB (now DOT) enforcement for a violation of the 10 point type size specification was contemplated, noncompliance with the regulation does not give rise to an implied private right of action on behalf of petitioners. *See Thompson* v. *Thompson*, 484 U.S. ——, 108 S.Ct. 513, 516 (1988); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 571 (1979); *Cort* v. *Ash*, 422 U.S. 66, 78 (1975).

According to the *LOT* decision, delivery of the Montreal Advice in 8 rather than 10 point type size constitutes "constructive nondelivery" of a ticket under *Lisi* and in turn triggers the Article 3(2) sanction of unlimited liability. *LOT*, 705 F.2d at 89-90. The District Court exposed the error of the *LOT* court as follows:

> [T]he 10-point type requirement [in the Montreal Agreement] has been grafted onto the treaty as the next phase in the attempt to circumvent the treaty provision. *In re Air Crash Disaster at Warsaw, Poland, supra,* [*LOT*] went so far as to construe the "special contract" that was the Montreal Agreement as part and parcel of the treaty, and indeed, to place that new, "modified" provision just where the courts wanted it to be.

Korean Air Lines Disaster, 664 F. Supp. at 1475. (J.A. 412)

The Second Circuit in *LOT* ignored the legal principle that only sovereign states may amend a multilateral treaty such as the Warsaw Convention. *See* Vienna Convention, 63 Am. J. Int'l L. at 876, 887. The "assumption that the Montreal Agreement can operate as an amendment to the Warsaw Convention," as opposed to supplementing the provisions of the Warsaw Convention, is the "basic flaw" both in petitioners' argument and in the Second Circuit's decision in *LOT* linking the treaty sanction to the Montreal Agreement. *See Korean Air Lines Disaster*, 664 F. Supp. at 1476. (J.A. 414)[37]

[37] In addition, the time frame within which the Montreal Agreement was adopted does not support any "historical or functional relationship" between its 10 point type size specification and the treaty sanction in Article 3(2) of the Warsaw Convention for failure to deliver a ticket. In May, 1966, when the international air carriers agreed to the type size specification in the Montreal Agreement, the District Court opinion in *Lisi* was only six weeks old. *See Lisi*, 253 F. Supp. 237 (S.D.N.Y. 1966). Moreover, until the District Court decision in *LOT*, 535 F. Supp. 833 (E.D.N.Y. 1982), no decision in the United States, or anywhere else, had imposed the Article 3(2) treaty sanction for noncompliance with the Montreal Agreement type size specification.

The holding in *Deutsche Lufthansa Aktiengesellschaft* v. *Civil Aeronautics Board*, 479 F.2d 912 (D.C. Cir. 1973) [*Lufthansa*], relied upon by petitioners, is inapposite. The court in *Lufthansa* held only that the CAB had statutory authority to issue Economic Regulation Part 221.175(a), that the Regulation did not conflict with the Warsaw Convention[38] and, thus, that the CAB had not violated the direction in 49 U.S.C. § 1502, that it act consistently with any convention of the United States, in adopting the Regulation. *Lufthansa*, 479 F.2d at 916-18. The *dictum* in the *Lufthansa* decision to the effect that this Regulation gives Article 3(1)(e) "substantive effect" was based on the erroneous "adequate notice" concept of *Lisi* and failed to consider either the Regulation's history or the CAB's own view of the Regulation as adopted. *Lufthansa*, 479 F.2d at 917-18.

Petitioners' reliance on *Trans World Airlines* v. *Franklin Mint Corp.*, 466 U.S. 243 (1984), is misplaced. In *Franklin Mint*, the Court upheld the authority of the United States to determine the manner in which the liability limit would be converted into national, *i.e.*, United States, currency, as expressly authorized by Article 22(4) of the Convention. 466 U.S. at 261. The express treaty authorization in Article 22(4) for implementation by national or local law in no way supports petitioners' argument that each nation is authorized to "implement" independently the Article 3(2) treaty sanction. Carriers and passengers are permitted, pursuant to Article 22(1), to agree by "special contract" to increase the carrier's limit of liability, as has been done by the Montreal Agreement, but this does not permit modification of the liability rules or the establishment of a "separate liability regime." Petitioners cite no authority to support their arguments

[38] The court in *Lufthansa* noted that even prior to the CAB regulation, the International Air Transport Association [IATA] had promulgated provisions concerning many of the aspects of the passenger ticket. *See Lufthansa*, 479 F.2d at 917 n.8 (IATA Resolution 275 (now 724) first was approved by the CAB on September 1, 1949). (J.A. 324-326)

that Economic Regulation Part 221.175(a) specifying 10 point type size was promulgated as one of the "provisions of the Convention [which] authorized varying implementation by its member nations," and that imposing the treaty sanction of unlimited liability for noncompliance with the Regulation is simply an "implementation" of Article 3 by a United States court. *See* Petitioners' Brief at 23.

It must be emphasized that no relationship exists between the Article 3(2) treaty sanction and the Montreal Agreement type size specification. No language in the Montreal Agreement authorizes the imposition of any sanction for a print size irregularity in the Montreal Advice on the delivered passenger ticket. As the District Court correctly held:

> Nothing in the Montreal Agreement requires that an air carrier provide the statement of liability limitation in 10-point type or lose the benefit of that limitation. Nothing in the debate or dissatisfaction with the limitation which led to the Montreal Agreement confirms the contention that "adequate notice" was an issue.
>
> * * *
>
> While it is indeed correct that the Montreal Agreement must be read in connection with the Warsaw Convention, the resulting Warsaw/Montreal system does not include delimiting liability for failure to provide the statement in 10-point type size. In short, the Montreal Agreement may not be read wholesale into the Warsaw Convention.

Korean Air Lines Disaster, 664 F. Supp. at 1475-1476. (J.A. 412-413)

The *Lisi* and *LOT* decisions are incorrect. They cannot be reconciled with the unequivocal language of the Warsaw Convention, the intent of its drafters and the understanding of its signatories. The court in *Lisi* and *LOT* failed to uphold the duty of the judiciary to enforce a treaty of the United States as written until amended by

its signatories. *See Air France* v. *Saks*, 470 U.S. 392, 406 (1985). As the District Court properly held in rejecting as incorrect the *Lisi* and *LOT* decisions:

> American courts, faced with the prospect of enforcing a limitation which has become outmoded and contrary to domestic law, have taken avoidance of the treaty limitation upon themselves and have arrived at an interpretation of the Wadsaw system which, in cases such as those presented by Plaintiffs here, eliminates the treaty limitation altogether.

Korean Air Lines Disaster, 664 F. Supp. at 1471. (J.A. 404)

Article 3 of the Warsaw Convention—as originally written in 1929, as adopted by the United States in 1934 and as it stands today—remains the supreme law of the land. As the Court recently held, until the Warsaw Convention is changed by its signatories, "it cannot be stretched" to impose liabilities neither created nor intended by its drafters. *Saks*, 470 U.S. at 406. Thus, the court below was correct in holding that the Article 3(2) treaty sanction is imposed only for nondelivery of the passenger ticket as the treaty clearly states.

CONCLUSION

The judgment of the Court of Appeals for the District of Columbia Circuit should be affirmed in all respects.

Respectfully submitted,

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Relevant Provisions of the Warsaw Convention

Article 3

(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

(*a*) The place and date of issue;

(*b*) The place of departure and of destination;

(*c*) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

(*d*) The name and address of the carrier or carriers;

(*e*) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

49 Stat. 3015

Article 4

(1) For the transportation of baggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a baggage check.

(2) The baggage check shall be made out in duplicate, one part for the passenger and the other part for the carrier.

(3) The baggage check shall contain the following particulars:

(*a*) The place and date of issue;

(*b*) The place of departure and of destination;

(*c*) The name and address of the carrier or carriers;

(*d*) The number of the passenger ticket;

(*e*) A statement that delivery of the baggage will be made to the bearer of the baggage check;

(*f*) The number and weight of the packages;

(*g*) The amount of the value declared in accordance with article 22(2);

(*h*) A statement that the transportation is subject to the rules relating to liability established by this convention.

(4) The absence, irregularity, or loss of the baggage check shall not affect the existence or the validity of the contract of transportation which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (*d*), (*f*), and (*h*) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability.

Article 8

The air waybill shall contain the following particulars:

(*a*) The place and date of its execution;

(*b*) The place of departure and of destination;

(*c*) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration shall not have the effect of depriving the transportation of its international character;

(*d*) The name and address of the consignor;

(*e*) The name and address of the first carrier;

(*f*) The name and address of the consignee, if the case so requires;

(*g*) The nature of the goods;

(*h*) The number of packages, the method of packing, and the particular marks or numbers upon them;

(*i*) The weight, the quantity, the volume, or dimensions of the goods;

(*j*) The apparent condition of the goods and of the packing;

(*k*) The freight, if it has been agreed upon, the date and place of payment, and the person who is to pay it;

(*l*) If the goods are sent for payment on delivery, the price of the goods, and, if the case so requires, the amount of the expenses incurred;

(*m*) The amount of the value declared in accordance with article 22(2);

(*n*) The number of parts of the air waybill;

(*o*) The documents handed to the carrier to accompany the air waybill;

(*p*) The time fixed for the completion of the transportation and a brief note of the route to be followed, if these matters have been agreed upon;

(*q*) A statement that the transportation is subject to the rules relating to liability established by this convention.

49 Stat. 3016 & 3017

Article 9

If the carrier accepts goods without an air waybill having been made out, or if the air waybill does not contain all the particulars set out in article 8(*a*) to (*i*), inclusive, and (*q*), the carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability.

49 Stat. 3017

Article 20

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was

occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

49 Stat. 3019

Article 22

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold

Relevant Provisions of the Warsaw Convention

at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

49 Stat. 3019

Article 25

(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

49 Stat. 3020

Montreal Agreement

The undersigned carriers (hereinafter referred to as "the Carriers") hereby agree as follows:

1. Each of the Carriers shall effective May 16, 1966, include the following in its conditions of carriage, including tariffs embodying conditions of carriage filed by it with any government:

> The Carrier shall avail itself of the limitation of liability provided in the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw October 12th, 1929, or provided in the said Convention as amended by the Protocol signed at The Hague September 28th, 1955. However, in accordance with Article 22(1) of said Convention, or said Convention as amended by said Protocol, the Carrier agrees that, as to all international transportation by the Carrier as defined in the said Convention or said Convention as amended by said Protocol, which, according to the Contract of Carriage, includes a point in the United States of America as a point of origin, point of destination, or agreed stopping place.
>
> (1) The limit of liability for each passenger for death, wounding, or other bodily injury shall be the sum of US $75,000 inclusive of legal fees and costs, except that, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit shall be the sum of US $58,000 exclusive of legal fees and costs.
>
> (2) The Carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily in-

jury of a passenger, avail itself of any defense under Article 20(1) of said Convention or said Convention as amended by said Protocol.

Nothing herein shall be deemed to affect the rights and liabilities of the Carrier with regard to any claim brought by, on behalf of, or in respect of any person who has wilfully caused damage which resulted in death, wounding, or other bodily injury of a passenger.

2. Each carrier shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention, or the Convention as amended by the Hague Protocol, and by the special contract described in paragraph 1, the following notice, which shall be printed in type at least as large as 10 point modern type and in ink contrasting with the stock on (i) each ticket; (ii) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (iii) on the ticket envelope:

ADVICE TO INTERNATIONAL PASSENGER ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of cer-

tain (name of carrier) and certain other[1] carriers parties to such special contracts for death of or personal injury to passengers is limited in most cases to proven damages not to exceed US $75,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers travelling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately US $8,290 or US $16,580.

The names of Carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information please consult your airline or insurance company representative.

3. This Agreement shall be filed with the Civil Aeronautics Board of the United States for approval pursuant to Section 412 of the Federal Aviation Act of 1958, as amended, and filed with other governments as required. The Agreement shall become effective upon approval by said Board pursuant to said Section 412.

4. This Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement.

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[1] Either alternative may be used.

Montreal Agreement

Any carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with said Civil Aeronautics Board.

5. Any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to said Civil Aeronautics Board and the other Carriers parties to the Agreement.

CAB Agreement 18900 (May 13, 1966)

The following is an actual size reproduction of the Montreal Advice as contained in certain KAL passenger tickets of plaintiffs' decedents printed in 8.0 point modern type size:

ADVICE TO INTERNATIONAL PASSENGERS ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of KOREAN AIR LINES CO., LTD. and certain other carriers parties to such special contracts, for death of or personal injury to passengers is limited in most cases to proven damages not to exceed U.S. $75,000, or its equivalent per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers travelling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to pasengers is limited in most cases to approximately U.S. $10,000 or U.S. $20,000, or its equivalent.

The names of carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information, please consult your airline or insurance company representative.

NOTE: The limit of liability of U.S. $75,000, or its equivalent above is inclusive of Legal Fees and Costs except that in case of a claim brought in a State where provision is made for separate award of Legal Fees and Costs, the limit shall be the sum of U.S. $58,000, or its equivalent exclusive of Legal Fees and Costs.

NOTICE OF BAGGAGE LIABILITY LIMITATIONS

Liability for loss, delay, or damage to baggage is limited as follows unless a higher value is declared in advance and additional charges are paid: (1) for most international travel (including domestic portions of international journeys) to approximately U.S. $9.07 per pound ($20.00 per kilo) for checked baggage and U.S. $400.00 per passenger for unchecked baggage; (2) for travel wholly between U.S.A. points, to U.S. $750.00 per passenger on most carriers (a few have lower limits). Excess valuation may not be declared on certain types of valuable articles. Carriers assume no liability for fragile or perishable articles. Further information may be obtained from the carrier.

The following is an actual size reproduction of the Montreal Advice in 10 point modern type size:

ADVICE TO INTERNATIONAL PASSENGERS ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of KOREAN AIR LINES CO., LTD. and certain other carriers parties to such special contracts, for death of or personal injury to passengers is limited in most cases to proven damages not to exceed U.S. $75,000, or its equivalent per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers travelling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to pasengers is limited in most cases to approxmately U.S. $10,000 or U.S. $20,000, or its equivalent.

The names of carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information, please consult your airline or insurance company representative.

NOTE: The limit of liability of U.S. $75,000, or its equivalent above is inclusive of Legal Fees and Costs except that in case of a claim brought in a State where provision is made for separate award of Legal Fees and Costs, the limit shall be the sum of U.S. $58,000, or its equivalent exclusive of Legal Fees and Costs.

Relevant Economic Regulations

§ 203.4 *Montreal Agreement as part of airline-passenger contract and conditions of carriage.*

(a) As required by the Montreal Agreement, carriers that are otherwise generally required to file tariffs shall file with the Board's Tariff Division a tariff that includes the provisions of the counterpart to CAB Agreement 18900.

(b) As further required by that Agreement, each participating carrier shall include the Agreement's terms as part of its conditions of carriage. The participating carrier shall give each of its passengers the notice required by the Montreal Agreement as provided in § 221.175 of this chapter.

(c) Participation in the Montreal Agreement, whether by signing the Agreement, filing a signed counterpart to it under § 203.3, or by operation of law under § 203.5, shall constitute a special agreement between the carrier and its passengers as a condition of carriage that a liability limit of not less than $75,000 (U.S.) shall apply under Article 22(1) of the Warsaw Convention for passenger injury and death. Such participation also constitutes a waiver of the defense under Article 20(1) of the Convention that the carrier was not negligent.

14 C.F.R. § 203.4

§ 203.5 *Compliance as condition on operations in air transportation.*

It shall be a condition on the authority of all direct U.S. and foreign carriers to operate in air transportation that they have and maintain in effect and on file with the Board as signed counterpart of CAB Agreement 18900,

and a tariff (for those carriers otherwise generally required to file tariffs) that includes its provisions, as required by this subpart. Notwithstanding any failure to file that counterpart and such tariff, any such air carrier or foreign air carrier issued license authority (including exemptions) by the Board or operating in air transportation shall be deemed to have agreed to the provisions of CAB Agreement 18900 as fully as if that air carrier or foreign air carrier had in fact filed a properly executed counterpart to that Agreement and tariff.

14 C.F.R. § 203.5

§ 213.7 *Filing requirements for adherence to Montreal Agreement.*

It shall be a condition upon the holding of a foreign air carrier permit or other authority authorizing direct foreign scheduled air transportation that the holder have and maintain in effect and on file with the Board a signed counterpart of CAB Agreement 18900 (CAB Form 263), and a tariff (for those carriers otherwise generally required to file tariffs) that includes its provisions, and comply with all other requirements of Part 203 of this chapter. That form can be obtained from the Publications Services Division, Civil Aeronautics Board, Washington, D.C. 20428.

14 C.F.R. §213.7

§ 221.38 *Rules and regulations.*

(j) *Notice of limitation of liability for death or injury under the Warsaw Convention.* Notwithstanding the provisions of paragraph (h) of this section, each air carrier and foreign air carrier shall publish in its tariffs a provision stating whether it avails itself of the limitation on

liability to passengers as provided in Article 22(1) of the Warsaw Convention or whether it has elected to agree to a higher limit of liability by a tariff provision. Unless the carrier elects to assume unlimited liability, its tariffs shall contain a statement as to the applicability and effect of the Warsaw Convention, including the amount of the liability limit in dollars. Where applicable, a statement advising passengers of the amount of any higher limit of liability assumed by the carrier shall be added.

14 C.F.R. § 221.38(j)

§ 221.175 *Special notice of limited liability for death or injury under the Warsaw Convention.*

(a) In addition to the aforesaid requirements of this subpart, each air carrier and foreign air carrier which, to any extent, avails itself of the limitation on liability to passengers provided by the Warsaw Convention, shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention and whose place of departure or place of destination is in the United States, the following statement in writing:

ADVICE TO INTERNATIONAL PASSENGERS ON LIMITATIONS OF LIABILITY

Passengers embarking upon a journey involving an ultimate destination or a stop in a country other than the country of departure are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to their entire journey including the portion entirely within the countries of departure and destination. The Convention governs and in most cases limits the liability of carriers to passengers for death or personal injury to approximately $10,000.

Relevant Economic Regulations

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention. For further information please consult your airline or insurance company representative.

Provided, however, That when the carrier elects to agree to a higher limit of liability to passengers than that provided in Article 22(1) of the Warsaw Convention, such statement shall be modified to reflect the higher limit. The statement prescribed herein shall be printed in type at least as large as 10-point modern type and in ink contrasting with the stock on:

(1) Each ticket; (2) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (3) the ticket envelope; *And provided further,* That a carrier which has heretofore been furnishing a statement including either the sum of "$8,290" or the sum of "$9,000," in place of the sum of "$10,000" in the text of the statement prescribed by this paragraph, may continue to use such statement until July 15, 1974.

14 C.F.R. § 221.175(a)

Excerpts from The Hague Minutes

I, ICAO

[65] *Mr. Goodfellow* (IUAI—ICC) wished to make the position of the ICC perfectly clear. In his remarks on the preceding day he had said that the ICC were in agreement with the IUAI as to the undesirability of including details as to the documents of carriage in the Convention. The actual texts of the two ICC resolutions were as follows. The Vienna Resolution of 1952 read:

> "All details concerning such documentation should be omitted from the Convention and the precise form of the documents should be left to air carriers and users to evolve in the light of commercial experience."

That text had been slightly modified by the Tokyo Resolution following consideration of the latest ICAO draft. After welcoming the simplifications proposed by the ICAO Legal Committee, the ICC went on to say:

> "Details of the particulars to be included in the passenger ticket and baggage check should not be laid down in the Convention. Some form of ticket and baggage check is necessary but its description in the Convention, if any, should be kept as simple as possible."

That made the position of the ICC quite clear.

He now wished to answer the arguments put forward in Mr. Garnault's speech. He could find only two legal arguments in that speech.

The first argument was that, in internal carriage under the British order-in-council, the passenger knew what rules of liability applied, **[66]** whereas in international carriage

he might not know this. That argument must be based on the legal theory that every citizen was supposed to know the law, and, as the Warsaw Convention was incorporated in the national laws of each country that ratified the Convention, it applied with equal force to internal or international carriage.

In the second place, Mr. Garnault had emphasized that, if there were embarrassment in the issuance of documents of carriage, he preferred that the traffic clerk of the air carrier should be the one to be embarrassed rather than the passenger. The proposition which Mr. Garnault supported imposed, under the Rio text, an impossibility on the air carrier coupled with the sanction of unlimited liability if the carrier failed to achieve the impossible. No one knew better than Mr. Garnault how difficult it was for even a trained lawyer to be absolutely certain whether the Convention applied or not to certain classes of carriage. Therefore, to require the air carrier to say, as a matter of fact, whether the Convention did apply to a particular contract of carriage was to put the carrier in an impossible position.

The suggestion had been made that, if the Convention did not provide for a specified form of passenger ticket and impose a sanction for non-compliance with that form, carriers would not issue a ticket in proper form. That was completely contrary to the experience of the last twenty-five years. *During that period the industry had been operating under a convention in which there had been no sanction for failure to adopt the form of ticket recommended in Article 3(1) of the Convention.* Yet, if one looked at the airline tickets, it would be seen that every ticket did its best to comply with the conditions laid down in that article. The one thing which the ticket could not do

was to say positively that the Convention applied. What the tickets did do was to say that the Convention rules applied unless the carriage was not international as defined under the Convention. It had to be borne in mind that the documents of carriage were not used only by the big IATA airline companies, but by irregular carriers and charter companies all over the world and that what was possible for a big airline was not always possible or practical from the point of view of the smaller operators. Mistakes did occur and it was unworthy of a convention of this nature that those mistakes, committed in all good faith, should involve the carrier in the Draconic sanction of unlimited liability—the same sanction as was applied to wilful misconduct.

The effect of the sanction was very clearly indicated in what had happened in the carriage of air freight. There, the sanction of unlimited liability did apply if the essential particulars were omitted. The consequence was that there was more litigation under Articles 8 and 9 than under any other article except Article 25. That litigation was not between the owners of the goods and the air carriers, but between the insurers of the goods and the insurers of the air carrier's liability. There was some very expensive litigation on foot with many outstanding cases. Whatever might be the result, the cost of that litigation ultimately was passed on to the public. In the first place, it was passed on to the air carrier by way of increased premiums, and then, by him, in turn, it must be passed on to the consignors of goods. That was an example of how this sanction worked out in practice. He was sure that this was not the intention that the drafters of the original Convention had had in mind.

[67] Another point to bear in mind was that it was this chapter on documents of carriage alone which had pre-

vented the use of a negotiable air waybill ever since the Convention had been adopted.

In revising the Convention, the Conference should be looking 25 years ahead, a point which had been stressed by Mr. Alten who, although the oldest delegate there, had, perhaps, the youngest outlook in that connection. Mr. Alten had said that a passenger ticket for air travel should aim at the [*sic*] being just as simple as a railway ticket. That was the ideal the Conference should aim at. Legal considerations made it necessary that there should be a contract. There would always be a contract and documents of carriage, because it was as much in the interests of the air carrier as of the passenger to be able to prove what the contract of carriage was. But, if in this Convention, the Conference sought to tie the carrier down to a definite form of document and to impose very heavy sanctions for failure to conform to the Convention, he was afraid that it would be a very long time before the ideal of Mr. Alten was achieved.

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[80] *Mr. Goodfellow* (IUAI) said that it had been suggested, that in relation to particulars to be included in the tickets, the Protocol imposed **[81]** a less heavy burden on the carrier than the present Article 3. *He could not agree with this, since the Convention, unlike the Protocol, did not impose a sanction on the carrier for failure to include the statement concerning liability.* Therefore, whatever wording was adopted for Article III(a), any sanction which was imposed would make the position of the carrier unnecessarily worse.

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[84] *Mr. Ambrosini* (Italy) wished to return to the text of Article 3 of the Warsaw Convention in order to defend

it. There was a remarkable difference between this text and the corresponding text of the Rio Protocol. According to the text of the old Convention there was a sanction only in the case where the passenger ticket had not been delivered, while, in the case of the Protocol, there were two instances in which the carrier might have unlimited liability: where he accepted a passenger without a passenger ticket having been delivered and if the ticket did not include the statement that the carriage was subject to the rules relating to liability established by the Convention. Beyond doubt, the text of the old Convention was more favourable to the carrier than the Protocol.

In regard to a question of detail, he pointed out that the old text used the words "which exclude or limit his liability". It appeared to him that all the Delegates were in agreement to delete the words "exclude or".

With regard to the effect of the present Convention, he pointed out that the sanction of unlimited liability in the case of the absence of the passenger ticket was not very serious, since, according to the text of the Convention, the passenger had to prove that he had been *accepted* without delivery of the passenger ticket. But, it was not possible that the passenger might, in every case, be able to claim unlimited liability due to the fact that there was no passenger ticket as, for example, in the case of a stowaway. He must, above all, prove that the carrier had *accepted* him without wishing to give him the passenger ticket or without being able to give him the ticket.

[85] What about the question of damage sustained by the passenger? Either there would be no damage or what damage there might be, need not be very great. The passenger would have made his journey and arrived at his destination. What grounds would he have for claiming

compensation? In this case, the passenger who might suffer damage would almost always be within the limits of the Convention. If this were so, then the sanction in the Convention was not very serious.

He agreed with the Australian Delegate that there should not be a public law sanction but a private law sanction. Therefore, he was opposed to the proposal made by the United Kingdom Delegate to refer the matter to national legislations. Under that proposal each State could do what it wished and hand down arbitrary decisions. If States were left free to enact different rules, there would no longer be any uniformity of law. Consequently, he was opposed to having a public law sanction.

II, ICAO

Article III

[243]

83. *Comments and Proposals of the United States*

a) *Amendment of Articles III to VII, IX and XI of the draft Protocol*

In Article 3—

(a) Paragraph 1 shall be deleted and replaced by:

"(1) For the carriage of passengers a ticket shall be delivered containing the following particulars:

(a) The place and date of issue;

(b) The places of departure and of destination;

(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not

have the effect of depriving the transportation of its international character.

(d) The statement set forth below, printed in a color which contrasts with the other printing and with the ticket stock:

'*Advice to International Travellers* (in letters not less than ½ centimeter high)

Travellers embarking upon a journey involving an ultimate destination or stop in a country other than the country of origin are advised that the Warsaw Convention may be applicable to their journey. The Convention governs the liability of carriers to passengers and shippers and limits liability for personal injury or death in most cases to—Poincaré gold francs'."

(b) Paragraph 2 shall be deleted and replaced by:

"(2) The passenger ticket shall constitute *prima facie* evidence of the conclusion and conditions of the contract of carriage. The absence, irregularity or loss of the passenger ticket does not affect the existence or validity of the contract of carriage which shall, none the less, be subject to the rules of the Convention. Nevertheless if the carrier accepts the passenger without a passenger ticket having been delivered or if the ticket does not include the statement in the form required by Paragraph (1) relating to the applicability of the Convention he shall not be entitled to avail himself of any of the defenses which exclude or limit his liability."

Excerpts from the Warsaw Minutes

[47] Mr. Ripert (France): Sirs, since the amendments of the French Delegation have been reproached as upsetting the essence of the draft of the Convention which has been presented, I would like to remind the members of the conference of the history of Article 22 and to show that, far from upsetting the draft, it is we who reestablish it under its original form.

Those who did not participate in the work of the CITEJA and who read this article can imagine that it creates a favorable system in favor of the carrier. They say: Why not apply the common law to him?

Well, in reality, this Convention creates against the air carrier an exceptional system, because in the majority of the countries of the world, contracts of carriage are concluded under a system of free contract. The carrier is free to insert in the contract clauses which exclude or reduce his liability, as much for goods as for travelers. You are of course aware that they have lost no opportunity to do so, and presently many air carriers operate under this unregulated contractual system, and, in practice, in fact, they are not liable.

One has desired to impose upon them a compulsory system of liability. It must not be forgotten that this Convention declares null and void all clauses which would regulate the liability otherwise than does the text upon which you will be called to vote. It is thus compulsory law for all the carriers, a liability law which is imposed upon them. But, consequently, it was natural not to impose on them common law liability. It's in the spirit of compromise that one has said: All that can be asked from the air carrier is to take reasonable measures to avoid the damage, to have his aircraft in good flying condition, [48] and to make sure that they are well flown. If errors of navigation occur thereafter, the consignors with their goods, the

passengers in their persons, would bear the consequences thereof.

This system has been adopted, why? Because it is the system which had been agreed upon in maritime navigation, however more ancient than air navigation, and that was not retained; not because one is of a traditionalist spirit, but simply because one considers that there are exceptional risks of the sea in which it is just that consignors of goods and the passengers participate.

The essence of the draft of the CITEJA was that if the carrier had taken all reasonable measures, there would be no liability for him in the course of operation, that the consignors of goods and the passengers would cover themselves by insurance. It is following amendments presented within the CITEJA that the incidental sentences were introduced, and it is sufficient to note the wording of the text as it is presently presented to be convinced that successive amendments are involved.

One has required a different system for the carriage of passengers and goods: There is no legal reason why the liability of the carrier be regulated differently for passengers and for goods.

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[245] REPORT

presented in the name of the
International Technical Committee
of Aeronautical Legal Experts
by Mr. Henri De Vos, Reporter,

on the Preliminary Draft of a Convention
relating to documents of air carriage and
to the liability of the carrier in
international carriage by aircraft.

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Excerpts from the Warsaw Minutes

[247] CHAPTER II
Documents of Carriage

Section 1—Passenger Ticket

A special document is provided for carriage of passengers. This document is necessarily different from those used for carriage of baggage and the circulation of goods.

This baggage ticket must contain only a minimum of particulars.

Moreover, the sanction provided for for [*sic*] carriage of passengers without a ticket or with a ticket not conforming to the Convention is identical to that provided for, for carriage of baggage and goods.

This sanction formula constitutes a compromise between the different opinions of the governmental delegations to the CITEJA of which some asked that the document of carriage be compulsory certain of them with civil sanctions and others with penal sanctions, and others defended the principle of freedom of contract.

Ludecke v. Canadian Pacific Airlines Ltd.

Supreme Court of Canada, Martland, Ritchie, Pigeon, Estey and McIntyre, JJ.
March 20, 1979.

* * *

[53] APPEAL from a judgment of the Quebec Court of Appeal, 53 D.L.R.(3d) 636, dismissing an appeal and allowing an incidental appeal from a judgment of Challies, J., on a question of law arising out of a contract for carriage by air.

Peter R. Lack, for appellant.
W.S. Tyndale, Q.C., for respondent.

The judgment of the Court was delivered by

MCINTYRE, J.:—This is an appeal from the Court of Appeal for Quebec which allowed, in part, an appeal from the judgment of the Superior Court of that Province. The appellant, as widow of the deceased and next friend of her two infant children, sued the respondent in the Superior Court for damages resulting from the death of her husband, one G. T. Hodge, in a crash in Tokyo on March 4, 1966, of a commercial aircraft owned and operated by the respondent, who will hereafter be referred to as the "carrier". The deceased, a passenger on the aircraft, had a ticket, which also served as a baggage ticket, issued in England by a travel agent acting for British Overseas Airways Corporation. His trip commenced in London, took him to Delhi, Hong Kong and finally to Tokyo. The passage from Hong Kong to Tokyo was by the carrier on its aircraft. It was a successive carrier to British Overseas Airways Corporation within the meaning of the *Carriage by Air Act*, 1939 (Can.), c. 12 (R.S.C. 1952, c. 45 [now R.S.C. 1970, c. C-14]), and the *Carriage by Air*

Act, 1932 (U.K.), c. 36. These statutes introduced into the law of the two countries the *Warsaw Convention, 1929* [see Sch. I, R.S.C. 1970, c. C-14], an international convention governing international carriage by air. This appeal involves consideration of arts. 3 and 4 of the Convention reproduced hereunder in an English translation of the original French text:

Article 3

(1) For the carriage of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

(*a*) the place and date of issue;

(*b*) the place of departure and of destination;

[54] (*c*) the agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercised that right, the alteration shall not have the effect of depriving the carriage of its international character;

(*d*) the name and address of the carrier or carriers;

(*e*) a statement that the carriage is subject to the rules relating to liability established by this Convention.

(2) The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage, which shall none the less be subject to the rules of this Convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be

entitled to avail himself of those provisions of this Convention which exclude or limit the liability.

Article 4

(1) For the carriage of baggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a baggage check.

(2) The baggage check shall be made out in duplicate, one part for the passenger and the other part for the carrier.

(3) The baggage check shall contain the following particulars:

(*a*) the place and date of issue;

(*b*) the place of departure and of destination;

(*c*) the name and address of the carrier or carriers;

(*d*) the number of the passenger ticket;

(*e*) a statement that delivery of the baggage will be made to the bearer of the baggage check;

(*f*) the number and weight of the packages;

(*g*) the amount of the value declared in accordance with Article 22(2);

(*h*) a statement that the carriage is subject to the rules relating to liability established by this Convention.

(4) The absence, irregularity or loss of the baggage check does not affect the existence or the validity of the contract of carriage, which shall none the less be subject to the rules of this Convention. Nevertheless,

if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (*d*), (*f*) *and* (*h*) above, the carrier shall not be entitled to avail himself of those provisions of the Convention which exclude or limit his liability.

The limitations of liability were provided for in art. 22 of the Convention. Liability for each passenger was, in the absence of any special contract with the carrier, fixed at a maximum of 125,000 francs and for loss of baggage 250 francs per kilogram.

The appellant advanced two claims—one based upon the death of her husband and the other upon the loss of his baggage. The carrier, while admitting liability, contended that its liability was limited in accordance with the terms of the Convention. Two questions thus arose for determination:

[55] (1) Did the limitation of liability of the *Warsaw Convention, 1929* apply to the claim based on the death of her husband?; and

(2) Did the limitation of the Convention apply to the claim for loss of baggage?

The actual ticket issued to the deceased was destroyed in the crash. For evidentiary purposes, ex. P-2 was introduced at trial. The agreed statement of facts provided in para. 7:

> 7. That BOAC Passenger Ticket and Baggage Check No. 0614-0000-0000, marked "Specimen Ticket", produced herewith as Exhibit P-2, and to avail as though here in full reproduced, is identical as to cover, size

> and number of pages as well as printed material and size of print as the BOAC airline ticket that had been issued to the late Gerard T. Hodge and used by him at the times and in respect to the flights referred to above.

References to the ticket in this judgment are references to ex. P-2.

Immediately below where the name of the deceased appeared on each of the flight coupons, or pages of the ticket, reference was made to the Convention in the following terms in 4½ point type:

> If the passenger's journey involves an ultimate destination or stop in a country other than the country of departure the Warsaw Convention may be applicable and the Convention covers and in most cases limits the liability of carrier for death or personal injury and in respect of loss of or damage to baggage.

On each flight coupon appeared the words "issued by British Overseas Airways Corporation subject to conditions of contract inside the front cover". The words "issued by" and the words referring to the conditions of contract were in type somewhat larger than 4½ point but smaller than the type used for "British Overseas Airways Corporation". The conditions of contract were in 4½ point type and para. 2(a), as far as it is relevant for these purposes, was in the following terms:

> 2(a) Carriage hereunder is subject to the rules and limitations relating to liability established by the Convention unless such carriage is not international carriage as defined by the Convention.

inside the back cover of the ticket, in type somewhat larger than 4½ point, appeared the following words:

> Liability of carrier in respect of baggage and other personal property is limited in respect of its declared value which shall not exceed $16.50 (U.S. currency) or its equivalent per kilogram for checked baggage and $330.00 (U.S. currency) or its equivalent per passenger for unchecked baggage, unless a higher valuation is declared in advance and additional charges are paid pursuant to carrier's tariffs.

[56] Upon an agreed statement of facts, the essentials of which have been cited above, the parties, pursuant to art. 448 of the *Code of Civil Procedure*, 1965 (Que.), c. 80, submitted a question of law with a joint factum in these terms:

> *Question of Law:*
>
> That this submission relates and applies solely and exclusively to the question of law as to whether, based upon the facts hereinabove set forth and the contents of the Exhibits forming part of the said facts, the Defendant is entitled to avail itself of those provisions of the First Schedule to the Canadian and U.K. Carriage by Air Acts (Warsaw Convention) referred to above, which limit the liability of Defendant towards Plaintiff for damages claimed by the latter as a result of the crash of Defendant's aircraft at Tokyo International Airport, Tokyo, Japan, on March 4th, 1966.

To understand the judgments in the Superior Court and the Court of Appeal, it may be helpful to explain the dif-

fering views which have been expressed on the construction of art. 3 of the Convention. American Courts, dissatisfied with the harsh provisions of the Convention on the question of limitation of liability, have construed art. 3(2) to require not only the delivery of a ticket but of one which, in accordance with art. 3(1), contains in legible form a statement that the carriage is subject to the rules relating to liability established by the Convention. They have also held that delivery must allow reasonable time for examination. They have considered that delivery of a ticket not meeting such conditions amounts to no delivery and therefore the provisions of art. 3(2), depriving the carrier of the benefit of the limitation where a passenger is accepted without a ticket, would apply. Several American cases are conveniently collected and discussed by Georgette Miller in her book *Liability in International Air Transport* (1977), pp. 82-5. They include *Lisi* v. *Alitalia Linee Aeree Italiane S.p.A.*, 9 Avi. 18,120 (S.D.N.Y. 1966), affd 9 Avi. 18,374 (2nd Cir. 1966), affd 390 U.S. 455 (U.S.S.C. 1968); *Warren* v. *Flying Tiger Line*, 9 Avi. 17,621 (S.D. Cal. 1964), revd & remd, 9 Avi. 17,848 (9th Cir. 1965); *Mertens* v. *Flying Tiger Line*, 9 Avi. 17,187 (S.D.N.Y. 1963); affd & remd, 9 Avi. 17,475 (2d Cir. 1965).

Another view which appears to have been accepted in most jurisdictions outside of the United States is that Article 3 fails to provide any sanction for its breach except in a case where a passenger has been accepted with no ticket. Therefore a ticket bearing an illegible statement or no statement at all would not result in a loss of the limitation to the carrier.

The trial Judge dealt with the formal question of law by answering the two questions set out earlier. He answered the first question dealing with the death claim

"yes" thus according the [57] limitation to the carrier. In this, it is clear that he did not apply the American test. He read art. 3 literally and adopted the view that no sanction could be applied where a ticket was delivered. He answered Q. 2 dealing with the baggage claim "no" thus denying the carrier the benefit of the limitation essentially for the reason that art. 4, unlike art. 3, contained a sanction for its breach and anything printed on the ticket purporting to be in compliance with art. 4 was so illegible as to amount to non-compliance.

The appellant appealed against the holding that the carrier was entitled to the benefit of the limitation of liability on the death claim. The carrier, by incidental appeal, sought a reversal of the holding that it was not entitled to the benefit of the limitation on the baggage claim.

The Court of Appeal, while rejecting the trial Judge's view that art. 3 contains no sanction for non-compliance, dismissed the death claim. Casey, J.A., said [53 D.L.R. (3d) 636 at p. 638]:

> This reasoning is not acceptable. The limitation contemplated by the Convention must be earned: the carrier must deliver a ticket which satisfies the mandatory requirements of art. 3(1) which article is in effect, a definition. If the ticket delivered does not satisfy these requirements it is not a ticket within the meaning of that article and the sanction of art. 3(2) will apply.
>
> However, appellant has two other hurdles: she must establish either that the ticket does not contain "a statement that the carriage is subject to the rules relating to liability established by this Convention" or, that the statement, if there is one, is not legible.

He then went on to hold that the words printed on the ticket were legible and sufficient in content to satisfy the requirements of the Convention and he dismissed the appeal. For the same reason, he allowed the incidental appeal holding, in the result, that the carrier was entitled to the limitation of liability provided by the Convention on both death and baggage claims. In this he applied the American test.

In my opinion, the words of art. 3(2) are plain and can admit of no misunderstanding. The absence, irregularity or loss of a passenger ticket will not affect the existence or the validity of the contract of carriage. The benefit of the limitation will be lost only where no ticket is delivered. The American cases referred to above which hold that delivery of a ticket with an irregularity, that is, a statement as required by art. 1[*sic*](*e*) which is illegible, amounts to no delivery of a ticket, ignore this plain language and fail to give effect to a precise statement of the law. I am unable, however harsh and unreasonable I may consider the limitation, to adopt the American test. It is clear in this case that the carrier [58] delivered a ticket and thus preserved its right to the limitation. For these reasons, it is my opinion that the trial Judge correctly answered Q. 1 and in so doing he properly construed art. 3. In view of the fact that the Court of Appeal reached, though for different reasons, the same conclusion, I would dismiss the appeal in respect of Q. 1.

As to the second question, the trial Judge recognized that, unlike art. 3, art. 4, which governed baggage claims, did provide a sanction. Because, in his opinion, the print was illegible on the ticket, he considered it did not contain the particulars set out in paras. (*d*), (*f*) and (*h*) of

art. 4(1). He therefore applied the sanction and denied the limitation to the carrier.

Casey, J.A., in the Court of Appeal, reversed this finding and I find myself in agreement with him on this question. An examination of the ticket satisfies me that the print was of such type and arrangement as to be legible by the ordinary person using ordinary diligence and the content of the ticket was adequate to meet the requirements of the Convention. I consider the ticket complied with art. 4 and, therefore, would dismiss the appeal on Q. 2 and accord the limitation to the carrier.

In argument in this Court, the case of *Montreal Trust Co. et al.* v. *Canadian Pacific Airlines Ltd. et al.* (1976), 72 D.L.R.(3d) 257, [1977] 2 S.C.R. 793, 12 N.R. 408, was fully discussed. Counsel for the appellant argued that it should lead to an allowance of this appeal. In my view, however, the *Montreal Trust Co.* case does not afford assistance to the appellant. It arose out of the same crash as did the case at bar. The deceased, Stampleman, had purchased an Air Canada ticket in Canada and his trip began and was to end in Canada. The present respondent was a successive carrier to Air Canada on that portion of the trip from Hong Kong to Tokyo where he perished. In that case, the *Warsaw Convention, 1929,* as modified by The Hague Protocol, Sch. II (September 28, 1955), governed the question because Canada had become a party to the Protocol through the enactment of "An Act to Amend the Carriage by Air Act", 1963 (Can.), c. 33. The same question arose in each of the Stampleman and Ludecke cases but different provisions must govern the answer.

Article 3 of The Hague Protocol provides:

Article 3

(1) In respect of the carriage of passengers a ticket shall be delivered containing:

[59] (*c*) a *notice* to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage.

(2) The passenger ticket shall constitute *prima facie* evidence of the conclusion and conditions of the contract of carriage. The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage which shall, none the less, be subject to the rules of this Convention. Nevertheless, if, with the consent of the carrier, the passenger embarks without a passenger ticket having been delivered, *or if the ticket does not include the notice required by paragraph (c) of this article, the carrier shall not be entitled to avail himself of the provisions of Article 22.*

(Italics added.) It will be seen that a notice is required in place of a statement and failure to comply will deprive the carrier of the benefit of the limitation under art. 22. Article 4 also uses the word "notice" instead of "statement".

Ritchie, J., speaking for the majority of this Court, said at pp. 263-4 D.L.R., p. 802 S.C.R.:

In relation to a claim for loss of life, art. 3(1) of the Convention, as I have said, merely required "a statement" and furthermore under that article the absence of that "statement" did not preclude the carrier from limiting its liability provided that the ticket was "delivered". The amended article as contained in the Protocol not only requires a "notice" but the absence of such "notice" denies the carrier the benefit of art. 22. The "notice" required by the Protocol and the statement required by the Convention are therefore two completely different requirements with radically different effects and with the greatest respect I think that the Court of Appeal erred in applying the reasoning which had been used in the *Ludecke* case in interpreting the Convention to the interpretation of the Protocol in the present case.

I am of the opinion that with these words he effectively distinguished between the two cases. Whether a different result would have followed in the case at bar if The Hague Protocol had been the governing statutory provision does not arise in this case.

I would dismiss the appeal. In the circumstances of this case, I would direct that the parties pay their own costs.

Appeal dismissed.

Montreal Trust Co. et al. v. Canadian Pacific Airlines Ltd. et al.

Supreme Court of Canada, Laskin, C.J.C., Martland, Judson, Ritchie, Spence, Pigeon and Dickson, JJ.
December 20, 1976.

[258] Appeal from a decision of the Quebec Court of Appeal allowing an appeal from a judgment of Challies, A.C.J., in favour of the plaintiff in an action to recover damages for the death of an air line passenger.

Peter R. Lack, for appellants.
W. S. Tyndale, Q.C., and *Alastair Paterson*, Q.C., for respondent.
D. Jack, for intervenant, Dora Hallam.

Laskin, C.J.C., concurs with Ritchie, J.

Martland, J., concurs with Judson, J.

Judson, J. (dissenting):—The Quebec Court of Appeal has stated the issues in this appeal in clear and simple terms. First, did the ticket which was issued to the deceased passenger comply with the requirements of the *Warsaw Convention, 1929*, as amended by The Hague Protocol, so as to limit the carrier's liability? Second, was this notice reasonably legible and comprehensible? Their answer to both questions was "Yes" and they allowed the appeal and dismissed the action.

I agree entirely with their reasons for judgment and I would dismiss this appeal.

Ritchie, J.:—This is an appeal from a judgment of the Court of Appeal of the Province of Quebec allowing an appeal from the judgment rendered at trial by Challies, A.C.J., and declaring that Canadian Pacific Airlines Limited was entitled to limit its liability in accordance with

the provisions of art. 22 of the First Schedule of "An Act to amend the Carriage by Air Act" (The Hague Protocol), 1963 (Can.), c. 33, s. 3, with respect both to the death of the late Irving Joseph Stampleman and to the loss of his baggage as a result of the crash of one of the respondent's aircraft at Tokyo on March 4, 1966.

The appellants being the executor and the two surviving sons of the late Stampleman, commenced this action by writ of summons and declaration dated February 24, 1964, and submitted the following question of law for the decision of the Court in accordance with a joint statement of law and fact filed pursuant to art. 448 of the *Code of Civil Procedure*, 1965 (Que.), c. 80:

[259] *Question of Law*

> That this submission relates and applies solely and exclusively to the question of law as to whether, based upon the facts hereinabove set forth and the contents of the Exhibits forming part of the said facts, the Defendant is entitled to avail itself of the provisions of Article 22 of the First Schedule of the aforesaid "Act to amend the Carriage by Air Act (the Hague Protocol) which limits the liability of the Defendant towards Plaintiffs as to the amount of damages payable by Defendant to Plaintiffs as a result of the death of Joseph Irving Stampleman in the crash of Defendant's aircraft at Tokyo International Airport, Tokyo, Japan on March 4, 1966 and as a result of the loss or destruction of the registered baggage of the late Mr. Stampleman.

The rights and liabilities of the parties are governed by the *Carriage by Air Act*, R.S.C. 1970, c. C-14, Sch. I,

which incorporates in the law of Canada the French text *of the Warsaw Convention, 1929* as amended at The Hague in 1955, Sch. II (hereinafter referred to as "The Hague Protocol").

At the time of the crash Joseph Stampleman was travelling under a ticket issued by Air Canada on its own behalf and on behalf of successive carriers including the respondent. The ticket served as both passenger ticket and baggage check and the contemplated voyage was from Montreal to Vancouver to Hong Kong to Tokyo and return to Montreal. At the relevant time Canada, unlike the United Kingdom and Japan, was one of the high contracting parties to The Hague Protocol and it is the fact that the round trip began and ended in Canada which makes that the governing document.

The air ticket and baggage check in question are attached as exhibits to the agreed statement of facts and their contents are well summarized in the reasons for judgment of Mr. Justice Challies where he says·

> The ticket and baggage check, exs. P-1 and P-2 (ticket No. 014491120008), issued to the deceased by Air Canada contains near the top "subject to conditions of contract on page 2" which is readable with the naked eye and also in four and a half point type across the bottom the following reference to the Warsaw Convention: "If the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage."

Less than a month before rendering judgment in the present case (*i.e.*, December 31, 1971) Challies, A.C.J., had decided the case of *Ludecke* v. *Canadian Pacific Airlines Ltd.*, S.C.M. 746 832, in the Superior Court. That case arose out of the death of a passenger in the same air crash as Stampleman and the agreed question of law there posed under art. 448, *C.C.P.*, was similar in all respects to the question here at issue except that in the case of *Ludecke* it related to the defendant's right to limit its liability in accordance with the provisions of the *Warsaw Convention, 1929* whereas the present [260] question is directed to the rights under The Hague Protocol amending that Convention.

In the *Ludecke* case Challies, A.C.J., held that the statement in the air ticket in question that "carriage is subject to the rules and limitation in relation to liability established by the Convention" printed as it was in four and a half point type was not a "Statement" as required by art. 4 of the Convention and that the carrier was therefore not entitled to limit its liability as to baggage but that it was covered by the limitation provision with respect to the limitation provision for loss of life because of the wording of art. 3 of the Convention.

In the same case, Casey, J.A., speaking for the Court of Appeal (1974), 53 D.L.R.(3d) 636, found that the "statements" in four and a half point type in the ticket were reasonably readable and constituted compliance with the requirements of arts. 3 and 4 of the Convention so as to entitle the carrier to limit its liability as to any baggage claim and the claim for loss of life.

This judgment was not rendered until December 23, 1974. In the meantime (*i.e.*, December 31, 1971), Challies, A.C.J., rendered a judgment for the Superior Court in

the present case in which he recognized the difference in wording between arts. 3 and 4 of the Convention which governed the *Ludecke* case and those articles as they had been amended by The Hague Protocol which governed here, but nevertheless stated that "for the reasons given by the undersigned in *Ludecke* v. *C.P.A.*", the carrier was not entitled to limit its liability as to either loss of life or loss of baggage.

In reversing this judgment, Casey, J.A., speaking on behalf of the Court of Appeal, concluded by saying of The Hague Protocol:

> There are only two questions involved—did the ticket include the notice required by arts. 3(1)(c) and 4(1)(c) and was this notice reasonably legible and comprehensive. As in the case of *Ludecke* my answer to both questions is yes and for this reason I would maintain this appeal.

In my view the answer to the question raised by this appeal must depend upon whether or not the Court of Appeal was justified in relying upon its own interpretation of arts. 3 and 4 of the Convention in deciding a case which is governed by the same articles as amended by The Hague Protocol. The determination of this issue requires a consideration of the terms of these articles which provide:

[261]

WARSAW CONVENTION

Article 3

(1) For the carriage of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

. . . . . .

(*e*) a statement that the carriage is subject to the rules relating to liability established by this Convention.

(2) The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage, which shall none the less be subject to the rules of this Convention. Nevertheless, *if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this Convention which exclude or limit his liability.*

Article 4

(1) For the carriage of baggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a baggage check.

. . . . . .

THE HAGUE PROTOCOL

Article 3

(1) In respect of the carriage of passengers a ticket shall be delivered containing:

. . . . . .

(*c*) a *notice* to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers *for death or personal injury and in respect of loss of or damage to baggage.*

(2) The passenger ticket shall constitute *prima facie* evidence of the conclusion and conditions of the contract of carriage. The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage which shall, none the less, be subject to the rules of this Convention. Nevertheless, if, with the consent of the carrier, the passenger embarks without a passenger ticket having been delivered, *or if the ticket does not include the*

WARSAW CONVENTION

(3) The baggage check shall contain the following particulars:

. . . . . .

(*h*) a statement that the carriage is subject to the rules relating to liability established by this Convention.

(4) The absence, irregularity or loss of the baggage check does not affect the existence or the validity of the contract of carriage, which shall none the less be subject to the rules of the Convention. Nevertheless if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out in . . . and (*h*) above, the carrier shall not be entitled to avail himself of those provisions of the Convention which exclude or limit his liability.

(The italics are my own.)

THE HAGUE PROTOCOL

notice required by paragraph (1)(c) of this article, the carrier shall not be entitled to avail himself of the provisions of Article".

Article 4

[The relevant portions of which read:]

(1) In respect of the carriage of registered baggage, a baggage check shall be delivered, which, unless combined with or incorporated in a passenger ticket which complies with the provisions of Article 3, paragraph (1), shall contain:

. . . . . .

(*c*) a notice to the effect that, if the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers in respect of loss of or damage to baggage.

[262] The Hague amendments, in so far as they affect the present issue, are notable for the fact that (1) the Convention simply required the inclusion in the ticket of "a statement" relating to the limitation of the liability of the carrier as established by the Convention, whereas the amendment provided that such a statement should take the form of a "notice", and (2) that the amendment provided that in the absence of a "notice" the carrier is not entitled to avail himself of the limitation provisions in respect either of death or loss of baggage, whereas the Convention contains no such sanction with respect to claims for loss of life except in the case of no passenger ticket "having been delivered" to the claimant.

In holding that the company was not entitled to limit its liability for loss of the baggage in the *Ludecke* case, Challies, A.C.J., relied heavily on a number of American authorities to the effect that the "statement" in the ticket required by the Convention must be in such form as to afford the passenger "a reasonable opportunity to take self-protective" measures to compensate himself for the limitation on his rights which art. 22 creates in favour of the carrier.

The cases of *Mertens* v. *Flying Tiger Line, Inc.* (1965), 341 F.2d 851, and *Lisi* v. *Alitalia-Linee Aeree Italiene* (1966), 370 F.2d 508, are cited with approval by Mr. Justice Challies. In the latter case, MacMahon, D.J. [253 F. Supp. 237 at p. 243], speaking of a ticket containing the required "statement" in the same print as that in the present case, described it as "virtually invisible" and also as "diminutively sized and unemphasized by bold face type, contrasting colour, or anything else".

In allowing the appeal in the *Ludecke* case, Casey, J.A., declined to follow the American authorities, saying [at p. 638]:

> What I cannot concede is that we must accept the decisions cited by appellant as establishing the standards by which the legibility of this "statement" must be judged. My view is that on this matter of fact the Convention should contain its own criteria. Since it does not I see no reason why we should treat this case differently from the others that come before this Court. Proceeding from this premise and having examined the relevant documents I conclude that the Carrier did print these "statements" in reasonably readable type.

I think it must be understood that limitation on the liability of the carrier created by art. 22 of the Convention in both its original and its amended form constitutes an encroachment on the rights of the individual passenger and as such it is to be strictly construed and can only be invoked when the requirements of the article have been exactly complied with.

The effect of art. 3(2) of the Convention was to empower carriers to limit their liability to passengers by the simple process of delivering a ticket containing a "statement that the carriage is subject [263] to the rules relating to liability established by the Convention" and the Court of Appeal has held in the *Ludecke* case that this requirement is met even when the "statement" is inconspicuously placed in four and a half point type. When the amendments were made by The Hague Protocol of 1955, an entirely new art. 3(2) was promulgated in which the requirement of a mere "statement" was deleted and the more elaborate provisions of the Protocol were substituted therefor. Under the amended art. 3(1)(*c*), the carrier is not only required to insert a "notice" but the terms of the notice are expressly provided for.

I do not think it can be assumed that the draftsmen of The Hague Protocol made the extensive changes which they did in art. 3 without weighing the words which they employed with some care and I cannot accept the suggestion that the substitution of the word "notice" for "statement" in arts. 3 and 4 was meaningless or ineffective. The French text of the Protocol governs its construction in case of any doubt and it was argued that the word "avis" bears a somewhat stronger meaning than "notice", but I do not need to base any conclusion on that argument as I am satisfied that both "a notice" or "un avis" mean at least something which is in a form calculated to attract attention.

As I have pointed out, Mr. Justice Casey in the course of his reasons for judgment in the *Ludecke* case, indicated his view "that on the matters of fact as to whether the 'statement' was sufficiently legible the Convention should contain its own criteria" and he considered that it did not do so. Had he been considering art 3(1)(*c*) of the Protocol, the learned Judge might have reached a different conclusion as it appears to me that that article does contain its own criteria, namely, that the statement shall be in such form as to constitute a "notice". Even if it were accepted that the four and one-half point type in which the requisite notice is reproduced at the foot of the first page of the ticket is reasonably readable, it cannot, in my view, be described as noticeable and it is not in a form which would attract the attention of the passenger in contradistinction to all the other material printed in the same type on the ticket. In relation to a claim for loss of life, art. 3(1) of the Convention, as I have said, merely required "a statement" and furthermore under that article the absence of that "statement" did not preclude the carrier from limiting its liability provided that the ticket was

"delivered". The amended article as contained in the Protocol not only requires a "notice" but the absence of such "notice" denies the carrier the benefit of art. 22. The "notice" required by the Protocol and the statement required by the Convention are therefore two completely different requirements with radically different effects and with the greatest respect I think that the Court of Appeal erred in applying the reasoning which had been used in the *Ludecke* case in interpreting the Convention to the interpretation of the Protocol in the present case.

As I have indicated, I am of opinion that the four and one-half point type reproduction of the material required to be inscribed by art. 3(1)(*c*) of the Protocol was not a "notice" within the meaning of that article and accordingly the carrier is not entitled to avail itself of the provisions of art. 22.

For all these reasons I would allow this appeal, set aside the judgment of the Court of Appeal and direct that the question here submitted for determination be answered in the negative and that the respondent is not entitled to avail itself of the provisions of art. 22 of the First Schedule to The Hague Protocol so as to limit its liability to the appellants as to the amount of damages payable as a result of the death of the late Joseph Irving Stampleman at Tokyo International Airport on March 4, 1966, and as a result of the loss or destruction of the registered baggage of the said Mr. Stampleman, the check for which was incorporated in his ticket.

The appellants will have their costs both here and in the Court of Appeal.

SPENCE, J., concurs with RITCHIE, J.

PIGEON, J., concurrs with JUDSON, J.

DICKSON, J., concurs with RITCHIE, J.

Appeal allowed.

United States Government Memorandum

To: E/TT—M. Loy

From: OA/AL—Leopold Gotzlinger

Subject: Meeting of Working Group on Warsaw Convention, January 7, 1966

January 10, 1966

The entire meeting was devoted to reaching agreement on minor substantive changes and editorial changes in the Lowenfeld Draft Position Papers, and to clarification of the differences existing as to more major substantive points. L is to prepare a paper by Monday showing the various alternatives as to points in dispute, as well as agreed sections.

Areas of major disagreement are as follows:

1. *As to Acceptability of a $75,000 Fallback Position*: FAA favors the shift of all three positions listed under IV from the category of "Possible Further Fallbacks" to the category of "Acceptable Fallbacks." FAA would also add a fourth acceptable fallback position providing for $75,000 under straight Hague conditions, CAB and L are opposed.

2. *As to Acceptability of a Fallback Position Calling for $100,000 but without Provision for Attorney Fees*:* CAB does not clear US proposal or support of such a position. They would shift reference to it from III to IV.

---

* To be added following word "Fees"—*and Provision Relating to Willful Misconduct.*

United States Government Memorandum

3. *Order of Fallback Positions*: L would not, under any circumstances, retreat to a $75,000 proposal before going down the whole list of fallback positions involving $100,000. FAA would retreat from $100,000 under Hague/Warsaw conditions to $75,000 under the same conditions, then propose $100,000 but without provision for additional recovery in case of wilful misconduct.

Mr. Mendelsohn said, in an aside, that he was sure the Department of State "would not favor wholeheartedly" a proposal that the Delegation should be authorized to support a $75,000 limit at Montreal. At best, the Department's stand might be "wishy-washy."

Mr. Wanner said that CAB would probably not approve a proposal for automatic insurance in the amount of only $66,600. Mr. Boyle argued that we should nevertheless remain open-minded toward proposals calling for absolute liability.

Mr. Lowenfeld announced that a meeting with John E. Stephen, General Counsel of the Air Transport Association, would take place on Monday, January 10, at 2:30. It is hoped that something can be learned about the carriers' position. Also, the attempt will be made to elicit Mr. Stephen's reaction as to the possible attractiveness to the carriers of a proposal involving the elimination from Warsaw/Hague of provisions for additional recovery in case of reckless action, but with addition of a provision for carrier liability without any proof of fault.

Attachment:

As stated.

United States Government Memorandum

FAA Proposal for Section III
of the Draft Position Paper for the
Montreal Conference

III. ACCEPTABLE FALLBACKS

In the event the primary position of the U.S. is not accepted, the U.S. Delegation is authorized to propose two additional alternatives in the following order of preference:

1. The U.S. Delegation may propose or support within the basic Warsaw/Hague system of limits of liability per passenger, amounts less than $100,000 down to the minimum figure of $75,000 per passenger including court costs and attorneys' fees. In conducting these negotiations, the U.S. Delegation should stop at the highest figure at which it is possible to secure a majority approval of the conference.

2. * In the event the U.S. Delegation is unable to obtain agreement by the majority of the conference on a limit of at least $75,000 per passenger including court costs and attorneys' fees within the framework of the present Warsaw/Hague system, it should then propose the figure of $100,000 per passenger including court costs and attorneys' fees but with elimination of the provision on exoneration in Article 20 and the exception for willful misconduct in Article 25.

* The FAA wishes to reserve its position on the desirability of a convention predicated on the principle that the airline is liable without fault to its passengers until after it has ascertained the views of the airlines and other interested parties on this question.

United States Government Memorandum

In the event this proposal fails to secure approval at the figure of $100,000 per passenger including court costs and attorneys' fees, the U.S. Delegation is authorized to propose or support lesser amounts down to a minimum figure of $75,000 per passenger including court costs and attorneys' fees. During this negotiation, the U.S. Delegation should stop at the highest figure on which it is able to secure agreement of a majority of the conference. In argumentation in support of this theory in a new convention, the Delegation may point out that this proposition would assure that any victim of an air disaster who could prove damages would be able to recover a reasonable amount without having to await the outcome of sometimes protracted and highly technical litigation attempting to prove negligence or willful misconduct on the part of the carrier or its agents. The delegation may also point out that while liability without fault is novel as applied to personal injury or death claims by passengers in international air transportation, it is not novel in other areas of aviation law or in law generally.

It should be made clear that the suggestion of the United States Delegation for liability without fault would not be equivalent to automatic insurance, since it would still require proof of damages in each case. Thus, under this system, as under the basic U.S. proposal, the awards or settlements would still be based on the standards applicable in each country for compensation for personal injury, taking into account earning capacity, de-

United States Government Memorandum

gree of dependence of survivors, life expectancy, etc.

In short, while under this proposal there would be some shift from the proposal in paragraph II, the advantage to the traveler and to the carrier would be roughly balanced.

Letter from Secretary of Transportation to President of the Senate

THE SECRETARY OF TRANSPORTATION
Washington, D.C. 20590

June 24, 1988

Honorable George Bush
President of the Senate
Washington, D.C. 20510

Dear Mr. President:

This letter requests that the Senate renew active consideration of Montreal Protocols 3 and 4 to the 1929 Convention for the Unification of Certain Rules Relating to International Transportation by Air (the Warsaw Convention). As discussed below, these Protocols are currently pending before the Senate.

The Warsaw Convention establishes a uniform liability system for international aviation that has been in effect for over 50 years. However, while the Convention promotes uniformity of law in international transportation of passengers and cargo, it is badly in need of reform, particularly in regard to its outdated $10,000 limitation on recovery for death or injury in international air transportation. The United States has been dissatisfied with this low level of recovery since it became a party to the Convention in 1934.

U.S. discontent with the Warsaw Convention and its low limitation on liability is so strong that in 1965 the United States announced its intention to denounce the Convention, agreeing to remain a party only after carriers serving the United States signed the 1966 intercarrier Mon-

Letter from Secretary of Transportation to President of the Senate

treal Agreement, in which they waived the treaty limitation and agreed to accept liability up to $75,000 per passenger. However, even this higher limitation is inadequate and unfair by modern standards. Protracted and costly litigation almost inevitably results wherein victims of air accidents or their families seek to circumvent the limitation so as to recover an amount more in keeping with current standards of reasonable recovery for injury or death. The result is a system that is unpredictable, unfair, costly and confusing to the American traveling public.

The United States has participated actively in the negotiation of the three international agreements which modify and improve the Warsaw Convention, *i.e.*, the 1955 Hague Protocol, the 1971 Guatemala Protocol, and the 1975 Montreal Protocols. None of these agreements contain liability limitations sufficient in themselves to meet the Administration's concerns about providing adequate compensation for death or injury in international air transportation. However, for the reasons stated below, the Administration believes that Montreal Protocols 3 and 4 (the "Montreal Protocols"), if combined with an adequate supplemental compensation plan, will provide the traveling public an adequate and fair system of recovery.

Among their other improvements to the Warsaw Convention, the Montreal Protocols increase the possible recovery by passengers against carriers from approximately $10,000 in the unamended Convention to 100,000 Special Drawing Rights (SDRs) (approx. $136,000) in the Convention as amended by the Protocols. In 1977, the Ford Administration asked the Senate for its advice and consent to ratification of these Protocols and proposed that

Letter from Secretary of Transportation to President of the Senate

the 100,000 SDR Protocol limit be supplemented by an additional $200,000 recovery per passenger from a separate passenger-funded supplemental compensation plan. However, although this combined recovery of over $300,000 would have been substantially greater than the amount recoverable under the unamended Warsaw Convention (or under the intercarrier Montreal Agreement), it was nonetheless opposed by some Senators as inadequate. On March 8, 1983, despite strong support from the Senate Foreign Relations Committee, the Senate voted in favor of the Protocols by a margin of only 50-42, thereby effectively denying advice and consent to ratification. However, a motion for reconsideration (129 Cong. Rec. S2279) was entered, and the Protocols are still pending before the Senate.

In 1985, I initiated an effort to revise and improve the supplemental compensation plan. During the past several years, the Transportation Department has worked with representatives of U.S. and foreign air carriers, with the insurance industry, and with other U.S. Government agencies, to develop a new draft supplemental compensation plan that should respond to the concerns of those Senators who opposed the plan in 1983.

The new plan would eliminate the major concern of the Senate by creating a private insurance program with unlimited recovery per passenger for economic damages, subject only to a per incident, per aircraft, limitation of $500 million. It establishes procedures for the presentation of claims and their evaluation by air carriers and the insurance carrier, and includes a claim settlement inducement provision whereby a court may award costs, in-

Letter from Secretary of Transportation to President of the Senate

cluding attorneys' fees, if a settlement offer equal to two-thirds of the ultimate recovery under the plan has not been made within specified periods. The plan contemplates a passenger fee of about $5.00, or less, per round trip international ticket purchased in the United States, to be collected by air carriers and paid to a private insurance carrier. I have attached a current draft of the plan, which will no doubt be developed further during Senate consideration.

Apart from the increase of air carrier liability to 100,000 SDRs, the Montreal Protocols improve the unamended Warsaw Convention in several other important ways. They provide an additional category of jurisdiction for liability suits, based on the permanent residency of the passenger. Thus, U.S. servicemen, diplomats and other employees stationed overseas and traveling in international air transportation not including points in the United States would for the first time be able to pursue adequate recovery for personal injury and death in U.S. courts. Moreover, the Protocols improve the Warsaw Convention's rules relating to baggage, ticketing procedures, and cargo documentation, particularly in facilitating electronic data processing for both passengers and freight, thus removing some existing impediments to maximum utilization of aviation's inherent advantage, speed of transport.

More generally, adherence to the Protocols will enable the United States to remain committed to one of the most widely adhered to treaty systems, and will thereby foster the international uniformity of law which was the original goal of the Warsaw Convention. That the United States has not yet ratified the Protocols has been a matter of

Letter from Secretary of Transportation to President of the Senate

considerable concern to our major foreign aviation partners and, for the most part, has kept them from ratifying these Protocols.

In view of the many advantages of the Montreal Protocols and in view of the improvements in the new supplemental compensation plan—which have been made specifically to satisfy the concerns of the Senate—it is my hope that the Senate will reconsider granting its advice and consent to ratification of the Protocols, so that the inequities in the present Warsaw system may be corrected in the near future. We look forward with the Senate towards this important revision of U.S. adherence to the Warsaw Convention system.

Sincerely,

/s/ JIM BURNLEY
Jim Burnley

Enclosure:

Draft Supplemental Compensation Plan

FOR ARGUMENT

No. 87-1055

Supreme Court, U.S.
FILED
DEC 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

LODGING

ELSIA CHAN, *et al.*,

Petitioners,

v.

KOREAN AIR LINES CO., LTD.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENT

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RECEIVED
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No. 87-1055

IN THE

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OCTOBER TERM, 1987

ELISA CHAN, *et al.*,

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v.

KOREAN AIR LINES CO., LTD.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENT

Respondent KOREAN AIR LINES CO., LTD. (KAL) submits this Supplemental Brief because it has been brought to the attention of KAL that the reproduction of the Montreal Advice on page 14a of the Appendix to the Brief for Respondent may not be in 10 point modern type size possibly due to the photographic process. Accordingly, KAL submits this Supplemental Brief to enclose the following original Montreal Advice printed in 10 point modern type size:

ADVICE TO INTERNATIONAL PASSENGERS ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of KOREAN AIR LINES CO., LTD. and certain other carriers parties to such special contracts, for death of or personal injury to passengers is limited in most cases to proven damages not to exceed U.S. $75,000, or its equivalent per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers travelling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately U.S. $10,000 or U.S. $20,000, or its equivalent.

The names of carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information, please consult your airline or insurance company representative. NOTE: The limit of liability of U.S. $75,000, or its equivalent above is inclusive of Legal Fees and Costs except that in case of a claim brought in a State where provision is made for separate award of Legal Fees and Costs, the limit shall be the sum of U.S. $58,000, or its equivalent exclusive of Legal Fees and Costs.

Respectfully submitted,

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November 1988

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No. 87-1055

In the Supreme Court of the United States

OCTOBER TERM, 1987

ELISA CHAN, ET AL., PETITIONERS

v.

KOREAN AIR LINES, LTD.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the limitation prescribed by the Warsaw Convention on an air carrier's liability applies only where notice of the applicability of the Convention's liability rules is printed on an airline passenger's ticket in at least ten-point type, as required by the Montreal Agreement.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1055

ELISA CHAN, ET AL., PETITIONERS

v.

KOREAN AIR LINES, LTD.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case presents a question of recurring importance concerning the meaning of certain provisions of the Warsaw Convention[1] and Montreal Agreement.[2] The Warsaw Convention creates a uniform regime to govern the international carriage of passengers, baggage and cargo by air, including rules governing passenger tickets, baggage checks, and air freight bills of lading (waybills), and regulates the liabilities of carriers. The Montreal Agreement is a private agreement among air carriers, approved by the Civil Aeronautics Board, committing them to enter into agreements with passengers pursuant to Article 22(1) of the Warsaw Convention, which increase the Convention's limita-

[1] This treaty, commonly referred to as "the Warsaw Convention," is formally titled the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. App. 1502 note. The governing text of the Convention is in the French language. See App., *infra*, 1a-14a; *Air France* v. *Saks*, 470 U.S. 392, 397 (1985).

[2] See Pet. App. B4-B6.

tion on liability, and committing them also to give a specified notice of that limitation (App., *infra,* 12a-13a). See Pet. App. B4-B5.

The court of appeals held that the failure to provide notice of the applicability of the Warsaw Convention's liability rules in ten-point type, as required by the Montreal Agreement, does not preclude an air carrier from availing itself of the Convention's limitation of liability at the level set by the Montreal Agreement. The court's opinion is inconsistent with the longstanding view of the Executive Branch that adequate notice to the passenger of the Convention's liability limitation is a precondition to enforcement of that limitation. It also undermines the Montreal Agreement's ten-point type requirement, insisted on by the United States in 1966 as a condition for withdrawing its notice of denunciation of the Warsaw Convention. For this reason, the Court's resolution of the question presented is of interest to the United States, which continues to regard the Warsaw Convention as a binding international agreement. Also, because victims of airplane accidents and their representatives sometimes sue both the United States and air carriers for damages, and the Convention's liability limitation applies only to air carriers, this Court's resolution of the question presented may affect the extent of the government's liability in future litigation.[3]

[3] At the Court's invitation (387 U.S. 901 (1967)), we filed a brief expressing the views of the United States in *Alitalia-Linee Aeree Italiane, S.p.A.* v. *Lisi,* 390 U.S. 455 (1968), aff'g by an equally divided court, 370 F.2d 508 (2d Cir. 1966), which raised the question whether the Convention's liability limitation applied in the absence of adequate notice of the applicability of the Convention's liability rules on the passenger's ticket. The United States is also a party in *Pan American World Airways, Inc.* v. *Pampin Lopez,* petition for cert. pending, No. 87-750 (filed Nov. 6, 1987), which raises the issue presented in this case. In our brief in No. 87-750, we recommended that the Court grant the petition in this case and hold the petition in No. 87-750 pending the Court's decision here.

STATEMENT

A. The Warsaw Convention and the Montreal Agreement

1. *Pre-Warsaw Convention Proceedings*: The Warsaw Convention of 1929 was the product of an ambitious effort initiated by France to achieve an international agreement on private aviation law. In 1925, 45 nations sent delegates to participate in the first international Conference on Private Aviation Law hosted by France in Paris. See *Air France* v. *Saks,* 470 U.S. 392, 401 (1985).[4] The delegates considered a proposed draft agreement prepared by France (App., *infra,* 21a-22a (15a-16a))[5] and, following its revision, approved of a draft agreement which provided both for a limitation on air carrier liability and for the establishment of both passenger tickets and air waybills, the latter concerning the air shipment of freight (*id.* at 25a-26a (19a-20a); see also *id.* at 22a-24a (16a-19a) (report and draft of conference committee)). A committee of experts on private aviation law—Comité International Technique D'Experts Juridiques Aériens (CITEJA)—was created to develop a draft agreement for the conferees to vote on at a future conference

[4] This effort paralleled that concerning public aviation law which culminated in the International Convention for Aerial Navigation, adopted at Paris on October 13, 1919. See Sack, *International Unification of Private Law Rules on Air Transportation and the Warsaw Convention,* 4 Air L. Rev. 345, 345-346 (1933); Cha, *The Air Carrier's Liability to Passengers in International Law,* 7 Air L. Rev. 25, 28 (1936); Ide, *The History and Accomplishments of the International Technical Committee of Aerial Legal Experts (C.I.T.E.J.A.),* 3 J. Air L. 27, 27 (1932); see also D. Billyou, *Air Law* 16-18 (2d ed. 1964).

The United States sent observers to both the Paris and Warsaw Conferences.

[5] We have reproduced in an appendix to this brief excerpts from the documents relevant to the Warsaw Convention's drafting history ("travaux preparatoires"). The documents are in French and translations (prepared with the assistance of the State Department) are also reproduced. References are to the appended English translations, followed by a parenthetical indicating where the original French language version (also appended) may be found. The original documents, including some translations into English contemporaneously made, are located in the National Archives, in RG 59, Boxes 5620 and 5621.

(see *id.* at 27a (21a)). See generally M. Smirnoff, *Le Comité International Technique D'Experts Juridiques Aériens (C.I.T.E.J.A.)* (1936). CITEJA established four commissions to draft agreements for CITEJA's plenary consideration (App., *infra,* 31a-33a (28a-31a)). The issues of the air waybill and the liability of the air carrier towards shippers of goods and passengers, among others, were assigned to the "Second Commission" (*id.* at 32a-33a (29a-30a)).

At CITEJA's second session, held in April 1927, the Second Commission submitted a draft agreement concerning the form of the waybill (App., *infra,* 53a-56a (40a-44a)), which CITEJA approved, with revisions (*id.* at 57a (45a-46a); see *id.* at 47a-53a (34a-40a) (CITEJA debates)). However, CITEJA also asked the Second Commission to prepare a draft convention joining the air waybill agreement with an agreement on the liability of air carriers (*id.* at 58a (46a)). The Second Commission met in March 1928, and prepared a new draft (*id.* at 92a-97a (72a-78a)) that included Articles dealing with passenger tickets and baggage checks in a manner largely paralleling in substance the provisions previously formulated for waybills (*id.* at 92a (72a-73a); compare 94a-97a (75a-78a) with 55a-56a (42a-44a)). In its Third Session, held in May 1928, CITEJA revised the Commission's draft and approved it for submission to member nations at a conference to be held in Warsaw. See J.A. 181-193; App., *infra,* 79a-92a (59a-72a) (CITEJA debates); see also *id.* at 105a-107a (98a-100a) (final CITEJA report).[6]

2. *The Warsaw Convention*: During the Second International Conference on Private Aviation Law, held in Warsaw in 1929, the delegates adopted a revised version of CITEJA's final draft, now known as the Warsaw Convention. The chapter on transportation documents establishes the requirements for passenger tickets (art. 3 (App., *infra,* 8a(1a)), baggage checks (art. 4 (App., *infra,* 8a-9a(2a)), and air waybills (arts. 5-16 (App., *infra,* 9a-12a (2a-5a)), including their legal effect and operation, information ("particulars") that must be contained in

[6] Model transportation documents were appended to CITEJA's final report (see App., *infra,* 102a-104a).

each, and sanctions for violation of the Convention's requirements regarding the documents. Under Article 3(1), the carrier must deliver a "ticket" to the passenger, which must contain, *inter alia,* "[a] statement that the transportation is subject to the rules relating to liability established by this convention" (App., *infra,* 8a (1a)). The consequence, under Article 3(2), of a "carrier accept[ing] a passenger without a passenger ticket having been delivered" is that the carrier is "not * * * entitled to avail himself of those provisions of th[e] convention which exclude or limit his liability" (App., *infra,* 8a(1a)).

The chapter on air carrier liability establishes, in Article 22, limitations on air carrier liablity for any injury to passengers or damage to checked baggage or to goods (App., *infra,* 12a-13a (5a-6a)). The liability limitation for passengers is 125,000 Poincaré francs (then approximately $8,300) (*ibid.*). Articles 20 and 21 provide the carrier with certain defenses to liability claims (App., *infra,* 12a (5a)), and Article 25 removes the liability limitation "if the damage is caused * * * by wilful misconduct" (App., *infra,* 14a (7a)). Finally, in the last chapter, Article 39 gives each nation the right formally to withdraw from the Convention, effective six months after notice of denunciation (App., *infra,* 14a (7a)).

The United States became a party to the Warsaw Convention in 1934, following a voice vote in the Senate. See 78 Cong. Rec. 11582 (1934); see generally Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention,* 80 Harv. L. Rev. 497, 502 (1967). There were no congressional hearings, reports, or debate on the question. See *TWA, Inc.* v. *Franklin Mint Corp.*, 466 U.S. 243, 273 (1984) (Stevens, J., dissenting).

3. *Post-Warsaw Convention Proceedings and the Montreal Agreement*: The Hague Protocol of 1955 amended the Warsaw Convention in several respects. See J.A. 245-277. The liability limitation was approximately doubled to 250,000 Poincaré francs (currently worth approximately $20,000), and certain air carriers' defenses were eliminated. In addition, the Conference adopted the United States' proposal to amend Article 3 in two significant respects. First, the notice requirement in Article 3(1)

was revised to demand that the ticket include a statement that the Warsaw Convention "may be applicable" if the passenger's journey involves travel in more than one country and that the Convention "in most cases limits the liability of carriers." Second, Article 3(2) was amended to provide that "if * * * the passenger embarks without a passenger ticket having been delivered, or if the ticket does not include the notice required by * * * this Article, the carrier shall not be entitled to avail himself of the [Convention's liability limitation]." See J.A. 252-255; see also *id.* at 215, 230. The United States, however, declined to ratify the Hague Protocol because it found insufficient the increase in liability limits for claims involving death or bodily injury. Lowenfeld & Mendelsohn, *supra,* 80 Harv. L. Rev. at 510-516, 532-546, 564.

On November 15, 1965, the United States gave notice of its intention to denounce the Warsaw Convention, and thus to withdraw effective in six months, pursuant to Article 39 of the Convention. At the same time, the United States made clear that it would rescind the notice of denunciation if the contracting nations appeared likely to agree to increase the liability limit to approximately $100,000, and the carriers agreed, in the interim, to increase the liability limit to $75,000. See J.A. 278. On the eve of the planned denunciation, the carriers agreed to the $75,000 liability limitation and to other United States demands. This Agreement, known as the Montreal Agreement of 1966 (Pet. App. B4-B6), was approved by the Civil Aeronautics Board (CAB) on May 13, 1966 (see J.A. 285-288; 31 Fed. Reg. 7302 (1966)), and the United States withdrew its proposed denunciation of the Convention in light of the Agreement (J.A. 281-284; see Lowenfeld & Mendelsohn, *supra,* 80 Harv. L. Rev. at 586-596).

Under the Montreal Agreement, virtually all air carriers conducting international flights into or out of the United States agreed to include in their tariffs a special contract under which the liability limit for death or bodily injury would be raised voluntarily to $75,000 inclusive of legal fees and costs (or $58,000 exclusive of legal fees and costs) for each passenger

(Pet. App. B4). The carriers further agreed to provide in their tariffs that they would waive their right to assert the due care defense provided by Article 20(1) of the Convention (Pet. App. B4). Finally, the carriers agreed "at the time of delivery of the ticket, [to] furnish to each passenger whose transportation is governed by the [Warsaw Convention] * * *" a notice, set out verbatim in the Agreement, "printed in type at least as large as 10 point modern type" advising the international passenger that the Warsaw Convention's liability limitations may apply to the journey (Pet. App. B5).[7]

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[7] Efforts to revise the Warsaw Convention have continued. The United States and many other nations have signed the Guatemala City Protocol of 1971 and the Montreal Protocols Nos. 3 and 4 of 1975, but neither of these amended versions of the Warsaw Convention has been ratified by the United States or entered into force. The Guatemala City Protocol amends the Convention by raising the liability limit to approximately $100,000 per passenger. It also makes significant changes in the rules governing liability. See generally, Mankiewicz, *Warsaw Convention: The 1971 Protocol of Guatemala City,* 20 Am. J. Comp. L. 335 (1972). The Protocol eliminates the due care defense for passenger death or injury, deletes the provisions of the original Warsaw Convention requiring delivery of a ticket and notice of the liability limitation, and, unlike the Convention, does not provide for unlimited liability where the carrier engages in wilful misconduct or fails to deliver a ticket to the passenger. The Guatemala City Protocol, however, retains in modified form the carrier's right to plead contributory negligence. Montreal Protocol No. 3, in relevant part, incorporates the preceding amendments made by the Guatemala City Protocol, but expresses the $100,000 liability limitation in terms of $100,000 Special Drawing Rights (currently worth approximately $136,000). See S. Exec. Rep. 97-45, 97th Cong., 1st Sess. 4 (1981); S. Exec. Rep. 98-1, 98th Cong., 1st Sess. 4 (1983). Montreal Protocol No. 4 amends and updates the cargo provisons of the Convention as modified by the Hague Protocol. See generally, G. Miller, *Liability in International Air Transportation* 37-49 (1977).

The Senate Committee on Foreign Relations previously recommended approval of Montreal Protocols Nos. 3 and 4, S. Exec. Rep. 98-1, *supra,* at 5, 6, coupled with a domestic plan to supplement the Convention's liability limitations. On March 8, 1983, the Senate, however, voted 50-42 to approve the protocols, falling short of the two-thirds majority needed for approval. 129 Cong. Rec. 4241-4251 (1983); see *Air France* v. *Saks,* 470 U.S. at 403. Following that vote, a motion to reconsider was entered (129 Cong. Rec. 4251 (1983)), but the Senate has not yet reconsidered the question. The Department of Transportation and several other agencies are currently formulating a new

B. Proceedings Below

On September 1, 1983, Korean Air Lines (KAL) Flight 007, a commercial flight, departed from Kennedy Airport for Seoul, South Korea. The airplane strayed into the Soviet Union's airspace, where it was destroyed by a missile launched by a Soviet military aircraft. All the passengers and crew members were killed. Petitioners, representatives of passengers who were killed, brought damage actions against respondent KAL in several federal district courts, including the Southern and Eastern Districts of New York, Eastern District of Michigan, District of Massachusetts, and District of Columbia. The Judicial Panel on Multidistrict Litigation transferred these actions to the District Court for the District of Columbia for pretrial proceedings.

Petitioners filed with the district court a motion for partial summary judgment in which they sought a declaration that respondent KAL could not rely on the Warsaw Convention's liability limitation, as modified by the Montreal Agreement, because the notice of that limitation appeared on the passengers' tickets in eight-point rather than ten-point type (Pet. App. A13). The district court denied petitioner's motion, ruling that the liability limitation applied.

According to the court, "defects in the physical ticket are not to interfere with the enforceability of the liability rules" (Pet. App. A31). "Indeed," the court noted, "inadequate notice through the statement could be considered an 'irregularity" or defect in the passenger ticket which 'shall not affect the existence or the validity of the contract of transportation, which shall nonetheless be subject to the rules of this convention' " (*ibid.* (quoting Article 3(2)); Pet. App. B1). "[T]he *quid pro quo* for the limitation is, not notice, but liability without fault. * * * There is no evidence that the treaty drafters and signatories intended 'adequate notice' to affect the operation of the treaty limitation" (*id.* at A34).

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supplemental compensation plan for consideration by the Senate, which would provide for unlimited per passenger recoveries for economic loss.

The district court likewise rejected petitioners' claim that the Montreal Agreement was intended to lift the liability limitation if the air carrier failed to include notice of that limitation on the passenger ticket in at least ten-point type (Pet. App A37-A40). According to the court (*id.* at A38), the Montreal Agreement "did not alter the *quid pro quo* by linking Articles 22 and 20 with Article 3." "Nothing in the debate or dissatisfaction with the limitation which led to the Montreal Agreement confirms the contention that 'adequate notice' was an issue" (Pet. App. A37). In any event, the Court found (*id.* at A39) a "basic flaw" in petitioner's argument to be "the assumption that the Montreal Agreement can operate as an amendment to the Warsaw Convention; it cannot." "Under the [Warsaw] Convention's provisions, the carrier and the passenger may agree to a higher limit of liability. While the limit may be raised, nothing in the 'special contract' provision [of the Convention] allows it to be completely removed" (*ibid.*). The court noted, however, that "[w]ere [it] faced with a clear, political decision to avoid the treaty limitation where there has not been 'adequate notice,' however defined, or were it faced with an express waiver, * * * then a different decision would be possible" (*ibid.*).

2. The court of appeals affirmed (Pet. App. A1-A11). The court "adopt[ed] as [its] opinion the comprehensive [opinion] of the district court," which the court of appeals reprinted as an appendix to its own decision (*id.* at A4, A12-A42).

SUMMARY OF ARGUMENT

Respondent KAL is not entitled to rely on the liability limitations of the Warsaw Convention because its passenger ticket failed to provide the required notice of the applicability of the Convention's liability rules in at least ten-point type, as required by the Montreal Agreement.

1. First, Article 3(1) of the Warsaw Convention explicitly requires the air carrier to deliver to the passenger a "ticket" that contains notice of the applicability of the Convention's liability rules. Article 3(2) states that a carrier who accepts a passenger without a "ticket" having been delivered may not invoke the

Convention's provisions limiting liability. Similar sanction provisions in other Articles of the Convention add that the liability limitation may be lost for the additional reason of failure to comply with specified particulars—including the notice requirement. Contrary to the court of appeals' opinion, a comparison of Article 3(2) to these parallel provisions in other Articles does not unambiguously establish that the Convention intended to leave the liability limitation in effect where a carrier delivers a ticket that lacks the required notice. The language may also be read to include the notice of limited liability as an essential element of any "ticket" whose delivery is necessary if the liability limits are to remain in effect.

The history of the Convention's preparation and adoption indicates that the drafters intended that the same loss of liability limitation was to result from failure to comply with the notice requirement in the case of passenger tickets, as in the case of baggage checks and air waybills. The differences in language appearing in Article 3(2), as contrasted with Articles 4(2) and 9, are explicable not by any intention to withhold the sanction for failure to give notice under Article 3, but rather as the unhappy consequence of two amendments that worked together to create an implication that neither of them intended. Indeed, one of the amendments was intended to make it clearer that the sanction would apply in that very circumstance. Hence, the negative implication upon which respondent KAL relies does not accurately reflect the parties' intent.

2. This Court need not step outside its limited judicial function to rule that the Montreal Agreement's ten-point type standard supplies the measure for determining compliance with the Warsaw Convention's notice requirement. Respondent is a party to the Montreal Agreement, which is a commitment among carriers to offer to passengers an increased ceiling on liability—as expressly contemplated in Article 22(1) of the Convention—and to set forth in an agreed upon form a particular notification of that limitation. Contrary to the opinion below, there is no bar to the air carriers' agreeing to comply with the Convention's notice requirement in a particular manner. Certainly, the carriers are hard pressed to argue that a violation of the Montreal Agreement's notice standard is unrelated to the requirements of the Warsaw Convention, in implementation of which the Montreal Agreement was executed.

In any event, the ten-point type standard provides a clear, well-settled standard that should be applied as the judicial measure for determining compliance with the Warsaw Convention's notice requirement. The ten-point standard reflects the longstanding judgment of the expert federal agency (formerly the Civil Aeronautics Board and currently the Department of Transportation) concerning the size of type providing sufficient notice of the liability rules. Such a clear and definite standard is also far more desirable for all concerned than respondent's proposal that courts engage in ad hoc factual inquiries into the adequacy of notice in individual cases.

ARGUMENT

THE WARSAW CONVENTION'S LIABILITY LIMITATION IS NOT AVAILABLE TO A CARRIER THAT FAILS TO PROVIDE NOTICE OF THE APPLICABILITY OF THE CONVENTION'S LIABILITY RULES ON A PASSENGER TICKET IN TEN-POINT TYPE, AS REQUIRED BY THE MONTREAL AGREEMENT

"When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place." *Louisville Gas & Elec. Co.* v. *Coleman*, 277 U.S. 32, 41 (1928) (Holmes, J., dissenting). So it is in this case. To many, the Montreal Agreement's requirement that carriers provide notice of the applicability of the Warsaw Convention's liability rules on a passenger ticket in at least ten-point type may seem arbitrary. Certainly, "[i]t might as well or nearly as well be a little more to one side or the other" (*ibid.*). Yet the United States withdrew its notice of denunciation of the Warsaw Convention only upon extracting from air carriers their agreement to adhere to that very requirement. Hence, the im-

portance of the ten-point type standard to the United States cannot be gainsaid.

Airline carriers may not, moreover, fairly argue that it is unduly harsh to deprive them of the Convention's liability limitation when they fail to provide passengers with the required notice in ten-point type on the ticket. For over 20 years, the air carriers have had notice of the ten-point type standard and have agreed to its strict adherence. That standard, once declared, hardly seems the sort to make ready compliance burdensome. Indeed, in many respects, the ten-point type standard would seem far preferable to air carriers than the more vague standard that notice must be "adequate."

For whatever reason, however, some carriers, such as respondent KAL in this case, seem unable or unwilling to achieve compliance with the clear standard and thus would have the Court, like the court of appeals, apply its own notion of what constitutes "adequate notice" (Pet. App. A37). We believe their invitation should be declined and the Montreal Agreement's ten-point standard strictly honored. We believe, moreover, that the sanction supplied by the Warsaw Convention, and furthered by the Montreal Agreement, for failure to include the requisite notice should apply where the ten-point type standard has not been met. Any seeming inequity in application of that sanction is, particularly at this late date, not unduly harsh; for the sanction is self-inflicted.

A. The Warsaw Convention Denies the Protection of the Convention's Limitation on Liability to an Air Carrier That Has Failed to Provide Adequate Notice on the Passenger Ticket of the Applicablity of the Convention's Liability Rules

1. The threshold question presented by this case concerns what condition, if any, Article 3 of the Warsaw Convention imposes on an air carrier in order to avail itself of the Convention's limitation on liability, which may work a considerable hardship on passenger victims of airline accidents. "The analysis must begin * * * with the text of the treaty and the context in which the written words are used." *Air France* v. *Saks*, 470 U.S. 392, 396-397 (1985) (citation omitted); *Societe Nationale Industrielle*

Aerospatiale v. *United States District Court for the District of Iowa*, No. 85-1695 (June 15, 1987), slip op. 10. In this case, the relevant treaty language is ultimately ambiguous because it admits of two different, and conflicting, interpretations. Article 3(1) provides that "the carrier must deliver a passenger ticket which shall contain the following particulars," and lists among those particulars "[a] statement that the transportation is subject to the rules relating to liability established by this convention" (App., *infra*, 8a (1a)). Article 3(2) then provides that "if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability" (App., *infra*, 8a (1a)). A fair reading of these provisions, taken together, is that an air carrier has not "delivered" a "ticket" within the meaning of Article 3(2), unless it contains the required "statement" of limited liability, and thus, in that circumstance, may not avail himself of the liability limitation.

Viewed "as a whole" (*K Mart Corp.* v. *Cartier, Inc.*, No. 86-495 (May 31, 1988), slip op. 7-8), however, the language and structure of the Convention introduces an ambiguity into what would otherwise have seemed the plainly correct reading of Article 3. Specifically, a comparison of the language and structure of Article 3 and Article 4 (concerning baggage checks) suggests a different construction. Both Articles list in their respective first paragraphs those "particulars" that must be included on a ticket (art. 3) or baggage check (art. 4) (App., *infra*, 8a-9a (1a-2a)). In virtually identical language, moreover, both include the notice requirement as such a required "particular" (arts. 3(1)(e) and 4(1)(h)). Both Articles, in their second paragraphs (arts. 3(2) and 4(2)), also impose the same sanction of the air carrier's loss of the protection of the Convention's liability limitation.

Articles 3 and 4 differ sharply, however, in their respective descriptions of the circumstances triggering that sanction. Both Articles explicitly make the liability limitation inapplicable where the carrier fails to deliver the relevant document – a ticket for passengers (art. 3(2)), or a baggage check for baggage (art. 4(2)). Unlike Article 3, however, Article 4 is also explicit in im-

posing that sanction where "the baggage check does not contain the particulars set out at [art. 4(1)](d), (f), and (h) above" (App., *infra,* 9a (2a)). Article 4(1)(h) is the section requiring that the baggage check give notice of the limitation on liability.

Article 4(2) thus appears to distinguish between not delivering a baggage check at all, and delivering a baggage check that fails to contain all of the particulars. It denies the protection of the liability limitation only for the omission of certain explicitly noted particulars. Article 9 does the same for waybills.[8] Particularly because both Articles 4(2) and 9 single out the notice requirement as triggering the sanction, the absence of a comparable clause in Article 3(2) provides support for respondent's view that the parties to the Convention did *not* intend to deny the limitation on liability based on any omission of particulars, including the notice of liability limitation.

The contrasting language in Articles 4 and 9 undercuts the apparent meaning of Article 3, read in isolation, but it does not compel acceptance of respondent's contrary reading.[9] It rather

[8] A comparison of the language contained in Article 3 and Articles 8 and 9, concerning waybills, is to the same effect. Article 8 lists those "particulars" that must be in an waybill, including a statement of the Convention's liability rules (see App., *infra,* 10a-11a (4a)). Article 9, like Article 4(2), specifically isolates that particular, among several others, violations of which deprive the air carrier of the Convention's liability limitation (see App., *infra,* 11a-12a (5a)).

[9] Nor, contrary to the lower courts' decision (Pet. App. A31), is their reading mandated by Article 3(2)'s provision that "[t]he absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention" (Pet. App. B1). That provision simply makes explicit that the rules of the Warsaw Convention, *including its provisions for loss of liability limitation in certain instances,* apply notwithstanding "the absence, irregularity, or loss of the passenger ticket." The Reporter of CITEJA's Second Commission made just this point on numerous occasions in responding to the concern, expressed by some delegates, that parties might, just as the lower courts did in this case, misread the phrase as somehow contradicting the Convention's sanction provision. See App., *infra,* 47a-49a (34a-37a), 52a-53a (39a-40a), 88a-91a (69a-71a); see also *id.* at 22a (16a), 23a (17a), 25a (19a) (original language). Indeed, this very concern prompted the CITEJA to amend the sanction provisions concerned with passenger tickets (art. 3(2)),

creates a dilemma between the most plausible reading of Article 3, which gives force to its requirement that a "ticket" be delivered, and the structure of Articles 4 and 9, which suggests that an explicit withdrawal of the liability limitation would have been set forth if intended. In such circumstances, " 'to ascertain [Article 3(2)'s] meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties' " (*Air France* v. *Saks,* 470 U.S. at 396 (quoting *Choctaw Nation of Indians* v. *United States,* 318 U.S 423, 431-432 (1943); *Societe Nationale Industrielle Aerospatiale* v. *United States District Court of the Southern District of Iowa,* slip op. 10-11)).

2. "[T]he 'travaux preparatories' of the Warsaw Convention are published and generally available to litigants [and] courts frequently refer to these materials to resolve ambiguities in the text." *Air France* v. *Saks,* 470 U.S. at 400 (citations omitted). They show that, virtually from the outset, the persons responsible for negotiating and drafting the treaty intended that the limitation of liability would not be available if notice of that limitation were not included in a passenger ticket, baggage check, or waybill. There is no compelling evidence that the treaty drafters at any time decided to distinguish, in that regard, passenger tickets from baggage checks and waybills.

a. The treaty drafters had early on recognized the need for sanctions for non-compliance with provisions of the Convention (App., *infra,* 22a-23a (16a)). They adopted the "eminently practical" scheme of depriving a carrier of the benefits of the Convention after determining that they could not rely on each

baggage checks (art. 4(2)), and waybills (art. 18 (then numbered 17), to eliminate any possible contention that a carrier could avoid any sanction simply by not issuing any ticket in the first instance. See App., *infra,* 91a-92a (71a-72a); see also *id.* at 57a (45a-46a). Finally, both Articles 4(2) and 5(2) refute the lower courts' suggestion that the omission of a particular from a travel document is simply an "irregularity," which does not trigger the sanction provision. Those Articles contain the identical clause, yet the Convention expressly denies the liability limitation where an air carrier fails to set forth on the baggage check or waybill specified particulars. See App., *infra,* 8a-9a (2a), 9a-10a (2a-3a), 11a-12a (5a).

nation to adopt the necessary domestic penal legislation (*id.* at 47a-49a (35a-37a), 54a-55a (42a)). The withdrawal of the liability limitation as a sanction for failure to provide notice of that limitation was first advanced in the draft proposal regarding waybills prepared by CITEJA's Second Commission (*id.* at 56a-57a (44a-45a); see *id.* at 51a-52a (38a-39a) (CITEJA debate)).

The same scheme was subsequently applied both to passenger tickets and baggage checks in the draft agreement of the Second Commission concerning both the waybill and the air carrier's liability towards shippers and passengers (App., *infra,* 92a (72a-73a), 94a-96a (75a-77a)). The requirement of a notice of limited liability was set forth, in Articles 3 and 4 of the new draft, as a separate paragraph in the same Article setting forth the required particulars.[10] In that respect those Articles differed from the waybill provision, where it was set forth in a separate Article from the particulars themselves (App., *infra,* 97a (78a)).

The sanction provision in Articles 3 and 4 of the Second Commission draft stated that an air carrier that failed to draw up a ticket or baggage check containing the listed particulars could not invoke the Convention's liability limitation (App., *infra,* 95a (86a), 96a (77a)). Article 4(2) specifically referred to particulars set forth at 4(1)(a)-(d) as triggering the sanctions (App., *infra,* 96a (77a)). It did not refer to the particulars then listed in Article 4(1)(e) and (f), which were unique to baggage checks. Article 3(2), which contained the same initial four particulars as Article 4, at Article 3(1)(a)-(d), but did not contain particulars (e) and (f), simply provided that "if the carrier did not establish a passenger ticket containing the particulars indicated above, * * * the carrier would not be entitled to rely on the provisions of the Convention which exclude or limit his responsibility" (App., *infra,* 95a (76a)). In neither Article 3 nor 4 did the sanction provision refer explicitly to the required state-

[10] The relevant sentence provided that "[t]he passenger ticket must also contain a statement that the transportation is subject to the rules relating to liability established by this Convention" (App., *infra,* 95a (75a); see *id.* at 96a (76a) (art. 4)).

ment of limited liability, which was set out in the Article with, but separate from, the list of particulars. However, the accompanying CITEJA working papers evidence that the drafters intended the limitation of liability to be inapplicable when the carrier failed to give the required notice on either a passenger ticket or baggage check. The Second Commission's Report states that the "same" sanction shall apply as under the Articles dealing with waybills for the transportation of goods, which expressly provide that a carrier cannot invoke the liability limitation in the absence of the required notice on the waybill regarding those liability rules (App., *infra,* 88a (68a), 97a (78a); see also *id.* at 56a-57a (43a-45a) (prior version)). See *id.* at 92a (73a) ("[T]he sanction for transporting passengers without regular tickets is the same as that for transportation of baggage and goods."); see also *ibid.* ("The remark concerning passengers applies to their baggage as well: a special article covers the baggage check.").

b. The same basic treaty structure persisted until the time that CITEJA approved of its final draft agreement for submission to the Warsaw Convention. While some changes were made in the language of the relevant provisions during CITEJA's final drafting sessions (and resulted in frequent renumbering of Articles), there is no suggestion in CITEJA's working papers that any of those changes were intended to modify the operation of the sanction clause.[11] None of the changes made – nor, indeed, any of those proposed – sought to

[11] The principal modification adopted in the CITEJA final draft, moreover, applied to passenger tickets, baggage checks, and air waybills alike, and was intended to guard against an unduly narrow reading of the sanction's scope. The amendment addressed a Brazilian delegate's concern that the statement in Article 5 (repeated in Articles 3 and 4) – that the absence, irregularity, or loss of a document did not affect the existence or validity of the contract – might be misconstrued to mean that an air carrier would lose the liability limitation only if there was a defect in a document and not when there was no document at all (App., *infra,* 88a-91a (68a-71a)). Despite the Reporter's assurances that no clarifying language was needed, the delegates voted to eliminate any possible ambiguity by redrafting Article 18 (and subsequently the corresponding phrases in Article 3 and 4) to provide that the carrier lost the liability limitation when the carrier failed to draw up a ticket, or when a ticket containing the certain particulars was not drawn up (App., *infra,* 90a-92a (70a-72a) ("If, for

single out passenger tickets for different treatment. Nor were any directed to the notice requirements.[12] CITEJA's final report to the Convention delegates stressed, like its earlier reports, that the same sanctions applied equally to passenger tickets, baggage checks, and waybills (App., *infra,* 107a (101a) ("[T]he sanction given for the transportation of passengers without a ticket or with a ticket that does not conform to the Convention is the same as that given for the transportation of baggage and that of merchandise.")).

c. The contrasting language in Articles 3, 4, and 9, upon which respondent KAL principally relies, is the product of two amendments adopted at the Warsaw Conference itself. An examination of the circumstances and objectives of both of those amendments suggests that any implication derived from a comparison of the language of Article 3 with the language and structure of Articles 4 and 9—that the parties to the Convention intended a different result under Article 3—does not accurately reflect the parties' true intent. Neither amendment purported to distinguish between Articles 3 and 4. Nor was either prompted by an intent to allow the liability limitation to remain in effect where notice of it had not been provided. Indeed, one of the amendments was proposed to make it clear that the limitation would be inapplicable under Article 3 if the carrier failed to comply with the notice requirement.

To be sure, the first amendment, which was proposed by the Greek delegation, was intended to limit the circumstances under which the liability limitation would be inapplicable under

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international transportation, the carrier accepts goods without a waybill having been made out, or if the waybill does not contain all of the particulars set out in Articles 9(a) to (g) inclusive, etc. * * *.")). See note 9, *supra.*

[12] Proposals to weaken the sanction provisions were offered during preparation of CITEJA's final draft, by a Greek delegate and were rejected as they had been once before (App., *infra,* 51a-53a (38a-40a), 82a-83a (62a-64a)). Those proposals were exclusively concerned with denying the limitation of liability for defects in setting forth the particulars listed in Article 3's first paragraph. These unsuccessful proposals therefore did not even suggest that the sanction was inappropriate for failure to satisfy the notice requirement, which was then set forth separately from the list of particulars.

Articles 3 and 4 (App., *infra,* 116a-118a (111a-112a)). But that proposal rendered the sanction inapplicable only as to failures to satisfy the particulars then listed in Article 3(1), some of which were also listed in Article 4(1). Significantly, at the time the Greek delegation offered its amendment, CITEJA's final draft was under consideration, which did *not* list the notice requirement as one of the "particulars" in Article 3(1) or Article 4(1), but which rather set it forth separately (see J.A. 182, 183; see also App., *infra,* 114a (109a) (amendments submitted prior to Conference)).

As explained by the Greek delegation, an amendment was necessary because the sanction (loss of liability limitation) was too severe where an error in one of the listed particulars was the result of the negligence of an employee of the carrier (App., *infra,* 116a-117a (111a-112a); see also *id.* at 51a-53a (38a-40a), 82a-83a (62a-64a) (prior unsuccessful efforts)). The illustrations offered by the Greek delegation never referred to the notice requirement (*ibid.*).[13] The Conference delegates agreed with the Greek concerns and, accordingly, they omitted altogether the clause in Article 3(2)'s sanction provision that applied the sanction where a carrier delivered a ticket not containing one of the listed particulars (J.A. 147-148); and in Article 4(2), the delegates revised the clause to remove those same particulars from the list of particulars that triggered the sanction (J.A. 154). However, at the time of the delegates' consideration of the amendment (see *id.* at 153-154), Article 4 contained other particulars not set forth in Article 3, and as to which the delegates wanted the sanction to apply. Thus Article 4—but not Article 3—continued to make references to the withdrawal of the liability limitation for failure to comply with certain particulars.

At the same time, the Japanese delegation successfully proposed a second amendment to Articles 3 and 4, which was intended to make it clear that the liability limitation would be inapplicable where a carrier failed to include the required notice

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[13] The Greek delegation referred to negligent omissions in "the place of issuance," "point of departure," "[carrier] name and address," or "an intermediate stop point" (App., *infra,* 116a (111a)).

on the passenger ticket or the baggage check (App., *infra,* 118a (113a)). This amendment was formulated on the basis of the language in the draft treaty proposed by CITEJA and was offered before, and not coordinated with, consideration of the Greek delegation's amendment.

The Japanese delegation was apparently concerned by the fact that the draft agreement prepared by CITEJA never directly stated that the limitation on liability would be lost in the absence of the required notice (see App., *infra,* 118a (113a)). Their concern was heightened with respect to Article 4 (*ibid.*), presumably because the sanction provision in Article 4(2), unlike Article 3(2), specifically listed only some of the preceeding particulars as triggering the sanction provision and, hence, might more readily have been misconstrued as excluding any other requirement not specifically mentioned, including the notice requirement. The Japanese delegation accordingly recommended that the notice requirement be listed in both Articles 3 and 4 as a "compulsory particular" (*i.e.*, a particular that triggers the sanction) (*ibid.*).[14] Significantly, however, the Convention delegates appear to have treated the amendment to Article 3 as merely technical in nature and without substantive effect.[15]

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[14] For similar reasons, the Conference decided to modify the wording of the Articles concerned with air waybills, including Article 9. CITEJA's final draft, like previous drafts, listed the notice requirement for waybills in Article 9, separately from both Article 8, which listed the particulars, and Article 17, which contained the sanction provision. In order to "retain systematic agreement with the other parallel articles" (presumably Articles 3 and 4), the Conference delegates, at the behest of the drafting committee, placed the contents of Article 9 as a particular within Article 8 and, with conforming amendments, renumbered as Article 9 what had been Article 17 (see *Second International Conference on Private Aeronautical Law Minutes* 199-200 (R. Horner & D. Legrez trans. 1975) [hereinafter *Second International Conference Minutes*]; see also J.A. 161).

[15] A Conference committee was responsible for organizing the various amendments and describing each as a "question of substance," of either primary or secondary importance, or as a mere technical "question of wording" ("rédaction") (see *Second International Conference Minutes,* 24-27; J.A. 194-206). The committee did not directly place the Japanese amendment to Article 3 under any of these categories, but the committee did include a cross-reference to the Japanese amendment to Article 4 and indicated the need "to take up the same general *wording* formula" (J.A. 197, 198 (emphasis added); App., *infra,* 114a (109a)). The absence of any discussion of the proposed Japanese amendment of Article 3 in the Conference's minutes also further suggests that the amendment was not regarded as substantive in nature.

The Greek and Japanese amendments together, however, had a wholly unintended consequence. The resulting language, which lists the notice requirement as a particular (the Japanese amendment), and omits from the sanction provision the phrase withdrawing the limitation on liability where there is a failure to set forth particulars (the Greek amendment), suggests an intention to eliminate any sanction for an air carrier's violation of Article 3's notice requirement. While it is unclear why this went undetected, it seems quite evident from the available historical information that the difference in language does not result from an intention to omit, as to passenger tickets, the sanction that is applicable to baggage checks and waybills for violation of the notice requirement.

3. A related provision of the Warsaw Convention also makes such a distinction improbable. The likely objective of the notice requirement, equally applicable to tickets, baggage checks, and air waybills, was to allow individuals to exercise their right under Article 22 to persuade the carrier to agree to a higher limit of liability (App., *infra,* 12a-13a (5a-6a)) or, alternatively, to obtain added protection from loss by purchasing private insurance.[16] In the absence of notice, however, the passenger or shipper of goods is effectively deprived of his rights under Article 22. As described by the Second Circuit in *Lisi* v. *Alitalia-Linee Aeree Italiane, S.p.A.,* 370 F.2d 508 (1966), aff'd by an equally divided court, 390 U.S. 455 (1968) (quoting *Mertens* v. *Flying Tiger Line, Inc.,* 341 F.2d 851, 856-857, cert. denied, 382 U.S. 816 (1965)), " 'there would

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[16] The right to contract for a higher liability limitation was an essential part of the Convention throughout its drafting history. The very first draft proposals included that right. See App., *infra,* 22a (15a-16a), 24a (18a-19a), 26a (20a).

be little reason [for Article 22] to require that the ticket state that the liability of the carrier is limited (art. 3(1)(e)), and to require that such a ticket be delivered to the passenger unless the Convention also required that the ticket be delivered in such circumstances as to afford the passenger a reasonable opportunity to take * * * self-protective measures.' " See also 1 International Civil Aviation Organization, *International Conference on Private Air Law—The Hague, September 1955—Minutes* 89-90 (1956) [hereinafter *Hague Minutes*].[17]

[17] Common carrier law prevailing at the time also makes it unlikely that the treaty drafters intended to draw a distinction between passenger tickets, baggage checks, and air waybills. The requirement of notice for application of the liability limitation was consistent with the then-settled principle of common carrier law allowing a common carrier to limit its liability (in the absence of negligence), if at all, only by express contract. See 2 T. Michie, *A Treatise on the Law of Carriers* §§ 1158-1183, 1328-1352 (1915); 1 R. Hutchins, *A Treatise on the Law of Carriers Administered in the Courts of the United States, Canada, and England* §§ 401-402 (1906); see also *New Jersey Steam Navigation Co.* v. *Merchant's Bank*, 47 U.S. (6 How.) 344, 382-385 (1848); cf. *Hague Minutes* 67 (remarks of Mr. Ambrosini (Italy)) ("His delegation also wished to have a sanction in the case where the carrier did not deliver a ticket or the ticket did not state that the carriage was subject to the Warsaw Convention. He recalled, in support of his position, that certain legislations, among them the law of Italy, provided that any clause in a contract limiting liability must not only be accepted by the parties but also signed. Therefore, to delete the sanction from the Convention would be going too far."); J.A. 225-226 (remarks of Mr. Ambrosini). The purpose of the express contract was to ensure that the shipper (or passenger) had voluntarily agreed to the limitation. The Warsaw Convention's notice requirement was far less rigorous than the voluntariness inquiry engaged in by courts at the time (see 2 T. Michie, *supra*, §§ 1178-1183, 1199-1219, 1354-1363; R. Hutchins, *supra*, §§ 406-418; see also *New Jersey Steam Navigation Co.*, 47 U.S. (6 How.) at 382-383), presumably because the Convention was intended to aid the then-fledgling aviation industry (cf. *TWA, Inc.*, v. *Franklin Mint Corp.*, 466 U.S. at 264-265 (Stevens, J., dissenting); H. Drion, *Limitation of Liability in International Air Law* 15 (1954)). But the sanction scheme retained in the Convention shows that some minimal evidence of voluntariness was required to legitimatize such an extraordinary limitation on liability. Significantly, there was no distinction in common carrier law in the relevant liability rules governing passenger tickets, baggage checks, and waybills.

4. Finally, "the practical construction adopted by the parties" to the Warsaw Convention does not compel a different result. *Air France* v. *Saks*, 470 U.S. at 396 (citation omitted). The Executive Branch's view on this question is long standing and entitled to "great weight." *Societe Nationale Industrielle Aerospatiale* v. *United States District Court for the Southern District of Iowa*, slip op. 12 n.19; *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 184-185 (1982). Over twenty years ago, we advised this Court of our views on this issue in response to this Court's invitation in *Lisi* (No. 67-70).[18] We advanced then the same construction of Article 3's sanction provision that we press now. Contrary to claims made in that case (see J.A. 289, 291), moreover, our *Lisi* submission did not represent a departure from our previous position. The United States' proposal at the Hague Conference in 1955 to amend Article 3(2) of the Warsaw Convention, which made explicit what we believe had previously been implicit in that Article—that the sanction should apply in the absence of fair notice—was merely clarifying in that respect. See *Hague Minutes* 61 (summary of remarks of Mr. Calkins (U.S.)) ("His delegation did not agree in all respects with the Rio Protocol. However, it did agree with the retention of the present sanction requirements in general for failure to set forth the appropriate specifications on the tickets."). The United States did not there state that the sanction would not apply in the absence of such amendment. The United States Senate's failure to consent to ratification of the Hague Protocol was also not based on any dissatisfaction with the sanction provision, as amended. See generally, Lowenfeld & Mendelsohn, *supra*, 80 Harv. L. Rev. at 512.

[18] An even earlier formal expression of the government's view is the CAB's promulgation in 1963 of a rule describing the notice that must be included in a passenger ticket by "each air carrier and foreign air carrier which, to any extent, *avails itself of the limitation on liability to passengers provided by the Warsaw Convention.*" 28 Fed. Reg. 11775-11777 (1963) (codified at 14 C.F.R. 221.175(a) (emphasis added)).

Nor do we think that the contrary views of other signatories to the Warsaw Convention should be controlling.[19] While those views are normally entitled to "considerable weight" (*Air France* v. *Saks*, 470 U.S. at 404 (citation omitted)), they are less weighty in this case for two reasons. First, they conflict with the view expressed by the United States, which is also a party to the Convention. Hence, there is no consensus among the parties. Second, unlike the United States, those nations have all ratified the Hague Protocol, which, among other things, amended the Convention to make explicit that the liability limitation is lost unless notice of it is given on the passenger ticket. Those nations are therefore less interested than the United States in the Warsaw Convention's original meaning. Moreover, their ratification of the Hague Protocol suggests their agreement with our basic view that the liability limitation should be lost in the absence of the required notice.

B. The Montreal Agreement's Ten-Point Type Standard Supplies the Measure for Determining Respondent KAL's Compliance With the Warsaw Convention's Requirement That it Provide Notice of the Convention's Liability Rules on a Passenger's Ticket

We also believe that KAL did not satisfy the Warsaw Convention's notice requirement on those passenger tickets that did not include notice of the applicability of the Convention's liability rules in at least ten-point type, as required by the Montreal Agreement. The court of appeals' contrary view ignores the relationship, both historical and legal, between the Montreal Agreement and the Convention. By replacing a clear standard with an unclear one, it undermines the certainty needed by air carriers, passengers, and courts alike. It also fails to give appropriate weight to the Executive Branch's judgment regarding the relationship between type size and notice to passengers.

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[19] See *Ludecke* v. *Canadian Pac. Airlines, Ltd.*, 98 D.L.R.3d 52 (Can. 1979), rev'g 53 D.L.R.3d 636 (Que. C.A. 1974), aff'g in part and rev'g in part 12 Av. Cas. (CCH) ¶ 17,191 (Que. Super. Ct. 1971); 67-70 United Kingdom and Northern Ireland Amici Br.; 67-70 Republic of Italy Amicus Br.; see also J.A. 306-320 (67-70 Canada Amicus Br.).

1. First, the lower courts failed to appreciate the special relationship between the Montreal Agreement and the Warsaw Convention. The Montreal Agreement is not merely a private agreement among air carriers approved by the federal government. As the title of the agreement makes plain, it is an "*Agreement Relating to Liability Limitations of the Warsaw Convention and Hague Protocol*" (Pet. App. B4), which commits the signators to enter into special contracts, pursuant to Article 22(1) of the Convention, including an increased liability limitation of $75,000. The Montreal Agreement sets forth explicitly the notice of limitation of liability, required to be printed on the ticket "in type at least as large as 10 point modern type and in ink contrasting with the stock" (Pet. App. B5). This very specific notice requirement is plainly intended to define the way in which the Convention's corresponding notice provision is to be satisfied (*id.* at A38-A39). The Montreal Agreement is consistent with the terms of the Convention and does not purport, or need to, "amend" the Convention itself in order to be legally effective.[20] Hence, although the Agreement is binding only on the carriers who were parties to it—and, of course, does not

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[20] Respondent may mistakenly argue that we took a different position in our submission to the Court in *Lisi*, where we advised the Court that "the [CAB] has never been presented with any carrier agreement purporting to fix the size of type or other typographical details of the Warsaw Convention notice" (67-70 U.S. Amicus Br. at 9 (merits) (J.A. 305); see also *id.* at 2 (J.A. 300). We were not, however, there addressing the significance of the Montreal Agreement, which was not relevant to the disposition of *Lisi* because the airplane accident at issue had occurred prior to that Agreement. We were instead simply refuting the air carrier's argument in *Lisi* that CAB approval of a uniform ticket proposed by the International Air Transport Association constituted a CAB determination that the Warsaw Convention's requirement that a ticket provide notice of the Convention's liability limitation had been satisfied. In our brief at the jurisdictional stage in *Lisi*, we also made clear that compliance with the Montreal Agreement's notice requirement would satisfy the Warsaw Convention's notice requirement, and argued that, for that reason, the lower court's decision in *Lisi* was of little prospective importance. See 67-70 U.S. Amicus Br. at 9 (jurisdictional stage).

bind other nations[21]—it is fair to hold those parties to the bargain struck. Respondent is a party to the Montreal Agreement (see Pet. App. B9; 14 C.F.R. Pt. 203).

As shown by both the history and terms of the Montreal Agreement, moreover, its notice provision is an essential part of that bargain. The United States agreed to withdraw its notice of denunciation of the Convention only after exacting a few critical concessions from the carriers.[22] The Agreement consists of only two numbered paragraphs, one of which is the requirement of a particular form of notice (Pet. App. B4-B6). The air carriers agreed to both in order to avoid losing the benefit of the Convention's liability limitations altogether in United States flights. Having done so, they should not now be allowed to retain the benefit of that limitation where, as in this case, they have ignored the very requirement that preserved it.

2. In any event, the ten-point type standard should be applied because it is the measure long ago adopted by the expert agency (CAB) then responsible for determining the sufficiency of such notice on passenger tickets. Even before the Montreal Agreement, the CAB promulgated a rule requiring foreign air carriers to include the notice of liability rules in ten-point type. See 28 Fed. Reg. 11775-11777 (1963) (codified at 14 C.F.R. 221.175(a)) (reproduced at Pet. App. B7). While that rule did not purport to construe the Warsaw Convention itself, there is no reason why a court should apply a different standard of ade-

[21] The United States did, however, obtain formal assurance of foreign governments whose carriers were participating in the Agreement that those governments approved of or at least would permit the Agreement to go into effect subject only to termination on 12 months' notice. See Lowenfeld & Mendelsohn, *supra*, 80 Harv. L. Rev. at 593-594.

[22] The United States unsuccessfully sought at the Hague Conference in 1955 to amend Article 3 of the Warsaw Convention to specify more precisely the notice required, including the size of type (larger than ten-point) (see J.A. 215-216). The treaty negotiating history suggests that the delegates preferred to allow each country to regulate the notice required. See Lowenfeld & Mendelsohn, *supra*, 80 Harv. L. Rev. at 513-515. The absence in the Hague Protocol of a more specific notice provision was one reason offered by those opposed to Senate approval of the Protocol. See *id.* at 513.

quacy in Warsaw Convention cases within our jurisdiction. Obviously some standard is necessary and it is better, for passengers and airlines alike, to have a clear, settled standard than it is to require courts and juries to engage in case-specific factual inquiry into the "adequacy" of notice in individual cases. Certainly such a fragmented approach would not further the Warsaw Convention's goal of "uniformity" in international air transportation. Cf. *TWA, Inc.* v. *Franklin Mint Corp.*, 466 U.S. at 256.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JUNE 1988

APPENDIX A

RELEVANT PROVISIONS OF THE WARSAW CONVENTION (CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO INTERNATIONAL TRANSPORTATION BY AIR, CONCLUDED AT WARSAW, OCTOBER 12, 1929, 49 STAT. 3000 *ET SEQ.*)

[Official French Language Version]

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CHAPITRE II – TITRES DE TRANSPORT

SECTION I – BILLET DE PASSAGE.

Article 3.

(1) Dans le transport de voyageurs, le transporteur est tenu de délivrer un billet de passage qui doit contenir les mentions suivantes:

a) le lieu et la date de l'émission;

b) les points de départ et de destination;

c) les arrêts prévus, sous réserve de la faculté pour le transporteur de stipuler qu'il pourra les modifier en cas de nécessité et sans que cette modification puisse faire perdre au transport son caractère international;

d) le nom et l'adresse du ou des transporteurs;

e) l'indication que le transport est soumis au régime de la responsabilité établi par la présente Convention.

(2) L'absence, l'irrégularité ou la perte du billet n'affecte ni l'existence, ni la validité du contrat de transport, qui n'en sera pas moins soumis aux règles de la présente Convention. Toutefois si le transporteur accepte le voyageur sans qu'il ait été délivré un billet de passage, il n'aura pas le droit de se prévaloir des dispositions de cette Convention qui excluent ou limitent sa responsabilité.

Article 4.

(1) Dans le transport de bagages, autres que les menus objets personnels dont le voyageur conserve la garde, le transporteur est tenu de délivrer un bulletin de bagages.

(2) Le bulletin de bagages est établi en deux exemplaires, l'un pour le voyageur, l'autre pour le transporteur.

(3) Il doit contenir les mentions suivantes;

a) le lieu et la date de l'émission;

b) les points de départ et de destination;

c) le nom et l'adresse du ou des transporteurs;

d) le numéro du billet de passage;

e) l'indication que la livraison des bagages est faite au porteur du bulletin;

f) le nombre et le poids des colis;

g) le montant de la valeur déclarée conformément à l'article 22 alinéa 2;

h) l'indication que le transport est soumis au régime de la responsabilité établi par la présente Convention.

(4) L'absence, l'irrégularité ou la perte du bulletin n'affecte ni l'existence, ni la validité du contrat de transport que n'en sera pas moins soumis aux règles de la présente Convention. Toutefois si le transporteur accepte les bagages sans qu'il ait été délivré un bulletin ou si le bulletin ne contient pas les mentions indiquées sous les lettres d), f), h), le transporteur n'aura pas le droit de se prévaloir des dispositions de cette Convention qui excluent ou limitent sa responsabilité.

SECTION III. – LETTRE DE TRANSPORT AÉRIEN.

Article 5.

(1) Tout transporteur de marchandises a le droit de demander à l'expéditeur l'établissement et la remise d'un titre appelé: "lettre de transport aérien"; tout expéditeur a le droit de demander au transporteur l'acceptation de ce document.

(2) Toutefois, l'absence, l'irrégularité ou la perte de ce titre n'affecte ni l'existence, ni la validité du contrat de transport qui n'en sera pas moins soumis aux règles de la présente Convention, sous réserve des dispositions de l'article 9.

Article 6.

(1) La lettre de transport aérien est établie par l'expéditeur en trois exemplaires originaux et remise avec la marchandise.

(2) Le premier exemplaire porte la mention "pour le transporteur"; il est signé par l'expéditeur. Le deuxième exemplaire porte la mention "pour le destinataire"; il est signé par l'expéditeur et le transporteur et il accompagne la marchandise. Le troisième exemplaire est signé par le transporteur et remis par lui à l'expéditeur après acceptation de la marchandise.

(3) La signature du transporteur doit être apposée dès l'acceptation de la marchandise.

(4) La signature du transporteur peut être remplacée par un timbre; celle de l'expéditeur peut être imprimée ou remplacée par un timbre.

(5) Si, à la demande de l'expéditeur, le transporteur établit a lettre de transport aérien, il est considéré jusqu'à preuve contraire, comme agissant pour le compte de l'expéditeur.

Article 7.

Le transporteur de marchandises a le droit de demander à l'expéditeur l'établissement de lettres de transport aérien différentes lorsqu'il y a plusieurs colis.

Article 8.

La lettre de transport aérien doit contenir les mentions suivantes:

a) le lieu où le document a été créé et la date à laquelle il a été établi;

b) les points de départ et de destination;

c) les arrêts prévus, sous réserve de la faculté, pour le transporteur, de stipuler qu'il pourra les modifier en cas de nécessité et sans que cette modification puisse faire perdre au transport son caractère international;

d) le nom et l'adresse de l'expéditeur;

e) le nom et l'adresse du premier transporteur;

f) le nom et l'adresse du destinataire, s'il y a lieu;

g) la nature de la marchandise;

h) le nombre, le mode d'emballage, les marques particulières ou les numéros des colis;

i) le poids, la quantité, le volume ou les dimensions de la marchandise;

j) l'état apparent de la marchandise et de l'emballage;

k) le prix du transport s'il est stipulé, la date et le lieu de paiement et la personne qui doit payer;

l) si l'envoi est fait contre remboursement, le prix des marchandises et, éventuellement, le montant des frais;

m) le montant de la valeur déclarée conformément à l'article 22, alinéa 2;

n) le nombre d'exemplaires de la lettre de transport aérien;

o) les documents transmis au transporteur pour accompagner la lettre de transport aérien;

p) le délai de transport et indication sommaire de la voie à suivre (*via*) s'ils ont été stipulés;

q) l'indication que le transport est soumis au régime de la responsabilité établi par la présente Convention.

Article 9

Si le transporteur accepte des marchandises sans qu'il ait été établi une lettre de transport aérien, ou si celle-ci ne contient pas toutes les mentions indiquées par l'article 8 [a) à i) inclusivement et q)], le transporteur n'aura pas le droit de se prévaloir des dispositions de cette Convention qui excluent ou limitent sa responsabilité.

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CHAPITRE III. – RESPONSABILITÉ DU TRANSPORTEUR

Article 20.

(1) Le transporteur n'est pas responsable s'il prouve qui lui et ses préposés ont pris toutes les mesures nécessaires pour éviter le dommage ou qu'il leur était impossible de les prendre.

(2) Dans les transports de marchandises et de bagages, le transporteur n'est pas responsable, s'il prouve que le dommage provient d'une faute de pilotage, de conduite de l'aéronef ou de navigation, et que, à tous autres égards, lui et ses préposés ont pris toutes les mesures nécessaires pour éviter le dommage.

Article 21.

Dans le cas où le transporteur fait la preuve que la faute de la personne lésée a causé le dommage ou y a contribué, le tribunal pourra, conformément aux dispositions de sa propre loi, écarter ou atténuer la responsabilité du transporteur.

Article 22.

(1) Dans le transport des personnes, la responsabilité du transporteur envers chaque voyageur est limitée à la somme de cent vingt cinq mille francs. Dans le cas où,

d'aprés la loi du tribunal saisi, l'indemnité peut être fixée sous forme de rente, le capital de la rente ne peut dépasser cette limite. Toutefois par une convenion spéciale avec le transporteur, le voyageur pourra fixer une limite de responsabilité plus élevée.

(2) Dans le transport de bagages enregistrés et de marchandises, la responsabilité du transporteur est limitée à la somme de deux cent cinquante francs par kilogramme, sauf déclaration spéciale d'intérêt à la livraison faite par l'expéditeur au moment de la remise du colis au transporteur et moyennant le paiement d'une taxe supplémentaire éventuelle. Dans ce cas, le transporteur sera tenu de payer jusqu'à concurrence de la somme déclarée, à moins qu'il ne prouve qu'elle est supérieure à l'intérêt réel de l'expéditeur à la livraison.

(3) En ce qui concerne les objets dont le voyageur conserve la garde, la responsabilité du transporteur est limitée à cinq mille francs par voyageur.

(4) Les sommes indiquée ci-dessus sont considérées comme se rapportant au franc français constitué par soixante-cinq et demie milligrammes d'or au titre de neuf cents millièmes de fin. Elles pourront être converties dans chaque monnaie nationale en chiffres ronds.

Article 23.

Toute clause tendant à exonérer le transporteur de sa responsabilité ou à établir une limite inférieure à celle qui est fixée dans la présente Convention est nulle et de nul effet, mais la nullité de cette clause n'entraîne pas la nullité du contrat qui reste soumis aux dispositions de la présente Convention.

Article 24.

(1) Dans les cas prévus aux articles 18 et 19 tout action en responsabilité, à quelque titre que ce soit, ne peut être

exercée que dans les conditions et limites prévues par la présente Convention.

(2) Dans les cas prévus à l'article 17, s'appliquent également les dispositions de l'alinéa précédent, sans préjudice de la détermination des personnes qui ont le droit d'agir et de leurs droits respectifs.

Article 25.

(1) Le transporteur n'aura pas le droit de se prévaloir des dispositions de la présente Convention qui excluent ou limitent sa responsabilité, si le dommage provient de son dol ou d'une faute qui, d'après la loi du tribunal saisi, est considérée comme équivalente au dol.

(2) Ce droit lui sera également refusé si le dommage a été causé dans les mêmes conditions par un de ses préposés agissant dans l'exercice de ses fonctions.

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CHAPITRE V.
DISPOSITIONS GÉNÉRALES ET FINALES

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Article 39

(1) Chacune des Hautes Parties Contractantes pourra dénouncer la présente Convention par une notification faite au Gouvernment de la République de Pologne, qui en avisera immédiatement le Gouvernement de chacune des Hautes Parties Contractantes.

(2) La dénonciation prodvira ses effets six mois après la notification de la dénouncement et seulement à l'égard de la Partie qui y aura procédé.

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[ENGLISH TRANSLATION]

CHAPTER II – TRANSPORTATION DOCUMENTS

SECTION I. – PASSENGER TICKET

Article 3

(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

(*a*) The place and date of issue;

(*b*) The place of departure and of destination;

(*c*) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

(*d*) The name and address of the carrier or carriers;

(*e*) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

SECTION II. – BAGGAGE CHECK

Article 4

(1) For the transportation of baggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a baggage check.

(2) The baggage check shall be made out in duplicate, one part for the passenger and the other part for the carrier.

(3) The baggage check shall contain the following particulars:

(*a*) The place and date of issue;

(*b*) The place of departure and of destination;

(*c*) The name and address of the carrier or carriers;

(*d*) The number of the passenger ticket;

(*e*) A statement that delivery of the baggage will be made to the bearer of the baggage check;

(*f*) The number and weight of the packages;

(*g*) The amount of the value declared in accordance with article 22 (2);

(*h*) A statement that the transportation is subject to the rules relating to liability established by this convention.

(4) The absence, irregularity, or loss of the baggage check shall not affect the existence or the validity of the contract of transportation which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (*d*), (*f*), and (*h*) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability.

SECTION III. – AIR WAYBILL

Article 5

(1) Every carrier of goods has the right to require the consignor to make out and hand over to him a document called an "air waybill": every consignor has the right to require the carrier to accept this document.

(2) The absence, irregularity, or loss of this document shall not affect the existence or the validity of the contract of transportation which shall, subject to the provisions of article 9, be none the less governed by the rules of this convention.

Article 6

(1) The air waybill shall be made by the consignor in three original parts and be handed over with the goods.

(2) The first part shall be marked "for the carrier", and shall be signed by the consignor. The second part shall be marked "for the consignee"; it shall be signed by the consignor and by the carrier and shall accompany the goods. The third part shall be signed by the carrier and handed by him to the consignor after the goods have been accepted.

(3) The carrier shall sign on acceptance of the goods.

(4) The signature of the carrier may be stamped; that of the consignor may be printed or stamped.

(5) If, at the request of the consignor, the carrier makes out the air waybill, he shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.

Article 7

The carrier of goods has the right to require the consignor to make out separate waybills when there is more than one package.

Article 8

The air waybill shall contain the following particulars:

(*a*) The place and date of its execution;

(*b*) The place of departure and of destination;

(*c*) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration

shall not have the effect of depriving the transportation of its international character;

(*d*) The name and address of the consignor;

(*e*) The name and address of the first carrier;

(*f*) The name and address of the consignee, if the case so requires;

(*g*) The nature of the goods;

(*h*) The number of packages, the method of packing, and the particular marks or numbers upon them;

(*i*) The weight, the quantity, the volume, or dimensions of the goods;

(*j*) The apparent condition of the goods and of the packing;

(*k*) The freight, if it has been agreed upon, the date and place of payment, and the person who is to pay it;

(*l*) If the goods are sent for payment on delivery, the price of the goods, and, if the case so requires, the amount of the expenses incurred;

(*m*) The amount of the value declared in accordance with article 22(2);

(*n*) The number of parts of the air waybill;

(*o*) The documents handed to the carrier to accompany the air waybill;

(*p*) The time fixed for the completion of the transportation and a brief note of the route to be followed, if these matters have been agreed upon;

(*q*) A statement that the transportation is subject to the rules relating to liability established by this convention.

Article 9

If the carrier accepts goods without an air waybill having been made out, or if the air waybill does not contain all the particulars set out in article 8 (*a*) to (*i*), inclusive, and (*q*), the carrier shall not be entitled to avail himself of the

provisions of this convention which exclude or limit his liability.

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CHAPTER III – LIABILITY OF THE CARRIER

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Article 20

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

Article 21

If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

Article 22

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that the sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) the sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

Article 23

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention.

Article 24

(1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

(2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

Article 25

(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

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CHAPTER V GENERAL AND FINAL PROVISIONS

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Article 39

(1) Any one of the High Contracting Parties may denounce this convention by a notification addressed to the Government of the Republic of Poland, which shall at once inform the Government of each of the High Contracting Parties.

(2) Denunciation shall take effect six months after the notification of denunciation, and shall operate only as regards the party which shall have proceeded to denunciation.

APPENDIX B

CONFERENCE INTERNATIONALE DE DROIT PRIVÉ AÉRIEN (27 OCTOBRE–6 NOVEMBRE 1925)

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[page 12] AVANT-PROJET [Annexé de Circulaire addressée par Ministères des Affaires Étrangères (30 Juin 1925)]

ARTICLE 2.

Le transport international sera constaté par un billet de passage ou une lettre de voiture internationale, mentionnant les points d'arrivée et de destination et, s'il y a lieu, les points de transbordement.

Ce billet de passage sera toujours nominatif et ne pourra être cédé. La lettre de voiture pourra être établie à personne dénommée, à ordre ou à porteur.

La lettre de voiture indiquera notamment la nature et le poids des objets transportés, la déclaration de leur valeur si elle est faite par l'expéditeur, le prix et le mode de fixation du prix de transport et le lieu du payement.

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[page 13] ARTICLE 5.

En aucun cas, la responsabilité du transporteur ne pourra dépasser la somme de dix mille francs par voyageur; toutefois le voyageur pourra en payant une taxe spéciale de garantie se faire garantir contre les risques du transporteur pour une somme déterminée.

Dans le transport des marchandises, la responsabilité du transporteur ne peut dépasser deux cents francs par colis

ou unité sauf déclaration spéciale de valeur faite par l'expéditeur, qui aura toute liberté à cet égard.

Les valeurs ci-dessus sont des valeurs or.

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[page 52]

RAPPORT
DE LA DEUXIEME COMMISSION

RESPONSABILITÉ DU TRANSPORTEUR PAR AÉRONEFS.

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[page 54] *Forme du contrat.* — Le contrat de transport est-il conventuel ou formel? L'opinion unamme de la Commission est que le contrat est conventuel; mais il y a une grande importance pratique à préciser les conditions du transport notamment pour la preuve éventuelle.

Ainsi avons-nous admis que le titre de transport prévu à l'article 3 constate l'existence du contrat mais ne le constitue pas.

Il faut exiger, dans la pratique, l'établissement d'un billet de passage ou d'une lettre de voiture sans que toutefois l'omission de ce titre influe sur l'existence du contrat; il faut aussi que l'expéditeur puisse exiger un récépissé de la marchandise et, à cet égard, il semble que le moyen le plus simple réside dans la remise d'un double de la lettre de voiture certifié par signature ou timbre du transporteur.

Ces lois nationales devront pourvoir, par des prescriptions pénales, à ce que ces exigences soient réellement sactionnées.

Le titre de transport n'est qu'un instrumentum mais il a une importance indéniable. [page 55] Nous avons estimé necessaire d'en préciser la forme, de facon à faciliter l'adoption d'un modéle unique par les diverses entreprises de transports aériens.

Les mentions que doit contenir le titre de transport sont énumérées à l'article 4; elles ne sont pas limitatives et point n'est besoin d'en justifier l'exigence. Nous n'avons pas précisé les documents qui accompagnent éventuellement la lettre de voiture, car il appartient d'une part à chaque État d'en établir la liste et d'autre part au transporteur de refuser une marchandise sans papiers réguliers. Ici nous posons seulement la regle que la lettre de voiture mentionnera à titre de simple inventaire les documents quels qu'ils soient qui lui seront annexés.

Comme pour le transport par chemin de fer nous avons admis que l'expéditeur répond de l'exactitude des mentions inscrites sur la lettre de voiture et que cette responsabilité sera attestée par la signature de l'expéditeur apposée sur la lettre de voiture.

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[page 59]

AVANT-PROJET DE CONVENTION INTERNATIONALE
SUR
LA RESPONSABILITÉ DU TRANSPORTEUR PAR AÉRONEFS.
[Annexé Rapport de la Deuxieme Commission]

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Article 3.

Le transport international sera constaté par un billet de passage ou une lettre de voiture.

[page 60] Le transporteur sera tenu, à la demande de l'expéditeur, de lui délivrer un double de la lettre de voiture dûment certifié.

L'absence ou la perte de ces titres ne préjudicie pas à l'existence et à la validité du contrat de transport.

Article 4

Le billet de passage et la lettre de voiture doivent mentionner:

Les points de depart et de destination;
L'itinéraire à suivre;
Le nom et l'adresse du passager ou de l'expéditeur;
Le nom et l'adresse du transporteur;
Le prix du transport, la date et le lieu du payement;
L'indication de la límite légale de responsabilité et, s'il y a lieu, de la garantie supplémentaire du transporteur suivant l'article 7;
Le lieu et la date de l'emission.
La lettre de voiture doit, en outre, indiquer:
Le nom et l'adresse du destinataire;
La nature de la marchandise et le mode d'emballage;
Le nombre, les marques, les numéros et le poids des colis;
La déclaration de leur valeur, si elle est faite par l'expéditeur, conformément à l'article 7;
Les documents remis au transporteur pour accompagner la lettre de voiture.
La lettre de voiture sera signée par l'expéditeur qui répondra de l'exactitude des mentions qui y sont contenues.

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[page 61] *Article 7.*

En aucun cas la responsabilité du transporteur ne pourra dépasser la somme de dix mille francs par voyageur. Toutefois par une convention spéciale avec le transporteur le voyageur pourra stipuler une limite de responsabilité plus élevée.

Dans le transport des marchandises, la responsabilité du transporteur ne peut dépasser 200 francs par colis, sauf déclaration spéciale de valeur faite par l'expéditeur, auquel cas le transporteur sera tenu de payer la valeur déclarée à moins qu'il ne prouve qu'elle est supérieure à la valeur réelle au point d'arrivée.

Les valeurs ci-dessus sont des valeurs or. Elles pourront être converties dans chaque monnaie nationale en chiffres ronds.

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[page 69] **PROJET DE CONVENTION.**

. . . . . .

également désireux de donner une solution à l'importante question de la responsabilité du transporteur dans les transports internationaux par aéronefs, ont résolu de conclure une Convention et ont en conséquence nommé pour leurs plénipotentiaires, savoir:

. . . . . .

lesquels, après s'être communiqué leurs pleins pouvoirs, trouvés en bonne et due forme, sont convenus des dispositions suivantes:

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[page 70] *Article 3.*

Le transport international sera constaté par un billet de passage ou une lettre de voiture.

Le transporteur sera tenu, a la demande de l'expéditeur, de lui délivrer un double de la lettre de voiture dument certifié.

L'absence, l'irregularite ou la perte du titre de transport ne préjudicie ni à l'existence ni à la validité du contrat du transport.

Article 4.

Le billet de passage et la lettre de voiture mentionneront notamment:

Les points de départ et de destination;
L'itinéraire à suivre:
Le nom et l'adresse du transporteur;

le prix du transport, la date et le lieu du payement;

L'indication de la limite légale de responsabilité, et, s'il y a lieu, de la garantie supplémentaire du transporteur suivant l'article 7;

Le lieu et la date de l'émission.

La lettre de voiture indiquera, en outre, notamment;

Le nom et l'adresse de l'expéditeur et du destinataire;

Le délai de transport, s'il est stipulé;

La nature de la marchandise et le mode d'emballage;

Le nombre, les marques les numéros et le poids des colis;

La déclaration de leur valeur, si elle est faite par l'expéditeur conformément à l'article 7;

Les documents remis au transporteur pour accompagne la lettre de voiture.

[page 71] La lettre, de voiture sera signée par l'expéditeur qui répondra de l'exactitude des mentions qui y sont contenues.

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Article 7.

La responsabilité du transporteur est limitée à la somme de dix mille francs par voyageur. Toutefois, par une convention spéciale avec le transporteur, le voyageur pourra fixer une limite de responsabilité plus élevée.

Dans le transport des marchandises, la responsabilité du transporteur est limitée à la somme de 200 francs par colis, sauf déclaration spéciale de valeur faite par l'expéditeur, auquel cas le transporteur sera tenu de payer la valeur déclarée à moins qu'il ne prouve qu'elle est supérieure à la valeur réelle au point de destination.

Les valeurs ci-dessus sont des valeurs or. Elles pourront être converties dans chaque monnaie nationale en chiffres ronds.

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[page 82] **MOTION**

Après avoir dressé, à titre d'exemple, la liste des questions dont l'étude devrait immédiatement suivre l'examen du probléme de la responsabilité du transporteur par aéronefs, la Conférence considerant l'importance, l'urgence, la complexite et la nature techniquement juridique de ces questions, exprime le voeu que soit, à bref délai, nommé un Comité special d'Experts chargé de preparer la continuation des travaux de la Conference.

Ce comité serait composé d'un nombre restreint de membres. Son siége normal serait a Paris.

La Conference prie, en conséquence, le Gouvernement français de bien vouloir se mettre en rapport avec les Gouvernements invités à cette Conférence pour examiner la suite à donner à cette recommendation.

ENGLISH TRANSLATION OF EXCERPTS FROM INTERNATIONAL CONFERENCE ON PRIVATE AVIATION LAW (OCTOBER 27-NOVEMBER 6, 1925)

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PRELIMINARY DRAFT. [Annexed to Circular from Foreign Affairs Minister (June 30, 1925)]

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ARTICLE 2.—The international transport shall be verified by a passage ticket or international way-bill, mentioning the points of arrival and of destination and, if necessary, the points of transshipment.

This passage ticket shall always be personal and cannot be transferred. The way-bill may be issued to a specified person, to order, or to bearer.

The way-bill shall indicate, in particular, the nature and weight of the objects carried, the declaration of their value if it is made by the sender, the cost, and the method of fixing the cost of carriage, and the place of payment.

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ARTICLE 5.—In no case can the responsibility of the carrier exceed the sum of 10,000 francs per passenger; however, the passenger may, by paying a special guarantee tax, have himself guaranteed against the risks of the carrier for a fixed sum.

As regards the carriage of goods, the responsibility of the carrier may not exceed 200 francs per parcel or unit, except in the case of a special declaration of value made by the sender, who shall have every freedom in this respect.

The above values are gold values.

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REPORT OF THE SECOND COMMISSION

Liability of the Air Carrier

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Form of the contract

Is the contract of transportation contractual or formal? The unanimous opinion of the Commission is that it is contractual; but there is great practical importance in specifying the transportation conditions, especially for evidence which may be needed at some future time.

We have therefore agreed that the transportation document provided in Article 3 establishes the existence of the contract but does not constitute it.

In practice, a passenger ticket or air waybill must be issued; however, the absence of this document shall not effect the existence of the contract. In addition, the consignor has the right to require a receipt for the goods and, in this regard, it seems that the simplest method is to hand over a copy of the air waybill, certified by the signature or stamp of the carrier.

These national laws must ensure, through penalties, that these requirements are respected.

The transportation document is only an "instrumentum," but it has an undeniable importance. We have felt it necessary to specify its format, in order to facilitate the adoption of a single model by the various air transportation companies.

The particulars that the transportation document is to contain are listed in Article 4. They are not restrictive and there is no need to justify requiring them. We have not specified such documents as may accompany the air waybill, because it is the responsibility of each State to establish a list of them, and it is the carrier's responsibility to refuse goods without the proper documents. We thus establish the rule that the air waybill must simply list the accompanying documents.

As for railway transport, we have agreed that the consignor shall be responsible for the correctness of the particulars listed in the air waybill and that this responsibility will be certified by the signature of the consignor affixed to the air waybill.

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Draft of the International Convention on the Liability of Air Carriers

Article 3

International transportation shall be established by a passenger ticket or an air waybill.

The carrier must deliver, upon the request of the consignor, two copies of a duly certified air waybill.

The absence or loss of these documents shall not prejudice the existence or the validity of the contract of transportation.

Article 4

The passenger ticket and the air waybill should contain the following particulars:

The place of departure and destination;

The itinerary to be followed;

The name and address of the passenger or the consignor;

The name and address of the carrier;

The freight cost, the date and place of payment;

A statement of the legal limit of liability and, if necessary, of the additional guarantee of the carrier according to Article 7;

The place and date of issue;

The air waybill should additionally indicate;

The name and address of the consignee;

The nature of the goods and the method of packing;

The number and weight of packages, and particular marks or numbers upon them;

The declaration of their value, if made by the consignor, in accordance with Article 7;

The documents handed over to the carrier to accompany the air waybill.

The air waybill shall be signed by the consignor, who shall be responsible for the correctness of the particulars mentioned therein.

Article 7

In the transportation of persons the liability of the carrier shall be limited to the sum of ten thousand francs per passenger. However, by special contract, the carrier and the passenger may agree to a higher limit of liability.

In the transportation of goods the liability of the carrier shall be limited to 200 francs per package, unless the consignor has made a special declaration of value, in which case the carrier will be liable to pay the declared value unless he proves that the sum is greater than the actual value at the point of destination.

The above-mentioned sums are gold values. They may be converted into national currencies in round figures.

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SCHEME OF AGREEMENT.

. . . . . .

likewise desirous of finding a solution for the important question regarding responsibility of the conveying party in international transports by aerial machines, they have decided to enter into an Agreement and as a consequence have appointed their plenipotentiaries, to wit:

. . . . . .

who having become acquainted with their full powers, found in good and due form, having agreed to the following provisions:

* * * * *

Article 3.

International transport shall be established by a travel-ticket or way-bill.

Upon request of the forwarding party, the carrier shall be bound to deliver him a duplicate of the way-bill duly certified.

Lack, irregularity or loss of the transport certificate does not cause prejudice to either the existence or validity of the transport contract.

Article 4.

The travel-ticket and way-bill shall mention in particular:

The place of departure and arrival.

The route followed.

The name and address of carrier.

Cost of transport, date and place of payment.

Indication of the legal limit of responsibility, and, should the case arise, of the supplementary guarantee of the carrier, according to Article 7.

Place and date of issue.

Furthermore, the way-bill shall mention, in particular:

The name and address of the forwarding party and the consignee.

The length of time for transport, if it is stipulated.

Nature of the merchandise and style of packing.

Number and weight of packets, marks and figures indicated thereon.

Declaration of their value, if same is made by the forwarding party, in accordance with article 7.

Documents handed to the carrier to go with the way-bill.

The way-bill shall be signed by the forwarding party who shall be held responsible for the correction of the indications contained therein.

* * * * *

Article 7.

Responsibility of the conveying party is limited to the sum of ten thousand francs per passenger. Nevertheless, upon special agreement with the conveying party, the passenger shall be able to fix a higher limit of responsibility.

In the conveyance of merchandise, the conveying party's responsibility is limited to the sum of 200 francs per package unless a special declaration of value has been made by the forwarding party, in which case the carrier shall be held liable for the value declared unless he is able to prove it greater than the real value at the place of arrival.

The foregoing values are gold values. They may be converted into every national currency in round figures.

* * * * *

MOTION

After having drawn up, as an example, the list of questions, study of which should immediately follow examination of the problem regarding responsibility of the conveying party, by aerial machine, the Conference, considering the importance, urgency, complexity and technically judicial nature of these questions, expresses the wish that a special Committee of Experts be appointed as soon as possible, on which shall devolve the task of preparing the continuation of the work of the Conference.

This Committee shall be composed of a restricted number of members. Its normal headquarters shall be in Paris.

The Conference, therefore, prays the French Government to be good enough to get into touch with the Governments invited to this Conference to examine the decision to be given with regard to this recommendation.

APPENDIX C

COMITÉ INTERNATIONAL TECHNIQUE D'EXPERTS JURIDIQUE AÉRIENS

COMPTE – RENDU DE LA 1ere SESSION

MAI 1926

* * * * *

[page 47] RESOLUTION No. 2

Règlement Intérieur du Comité

Le Comité décide d'adopter le Règlement intérieur ci-après:

* * * * *

[page 48] Article 4

Les Commissions prévues à l'article 2 ci-dessus nomment leur Président et les Rapporteurs de chacune des questions inscrites à leur ordre du jour.

Le Rapporteur prépare, sur la question qu'il a été chargé d'étudier, un questionnaire adressé à tous les membres de la Commission, qui doivent, dans un délai fixé par celle-ci lors de l'inscription à l'ordre du jour, adresser directement leur réponse au Rapporteur ainsi qu'une copie au Secrétaire du Comité.

Le Rapporteur établit son Rapport contenant un texte précédé d'un exposé des motifs. Il adresse son Rapport au Secrétaire du Comité pour distribution à tous les membres de la Commission.

La Commission se réunit ensuite sur convocation de son Président pour étudier les rapports élaborés et préparer un

texte à soumettre au Comité. Elle désigne alors les Rapporteurs chargés de présenter ses conclusions au Comité. Elle siège au lieu fixé par son Président, d'accord avec le Président du Comité.

Les textes ainsi préparés sont immédiatement communiqués par le Secrétaire du Comité à tous les membres du Comité.

* * * * *

[page 49] Article 7

Aprés approbation par le Comité, le Rapport Général et les Projets de Conventions sont transmis au Gouvernement français pour communication à tous les Gouvernements en vue de la convocation prochaine de la Conférence Internationale de Droit Privé Aérien.

* * * * *

RÉSOLUTION No. 3

Le Comité des Experts, estimant qu'il y a lieu d'examiner dans leur ensemble les problèmes du Droit Privé soulevés par la Navigation Aérienne décide de nommer quatre Commissions composées de onze Membres.

Chaque Commission aura à faire l'étude des questions suivantes:

1e Commission

1) Nationalité des aéronefs;
2) Registre aéronautique;
3) Propriété, copropriété, construction et transfert;
4) Droits réels, hypothèques, privilèges et saisie.

2e Commission

1) Régime des transports (transports commerciaux, tourisme, etc.);

2) Lettre de voiture;
3) Responsabilité du transporteur envers les expéditeurs de marchandises et les passagers;
4) Jet de la cargaison et avarie commune;
5) Location des aéronefs.

[page 50] *3e Commission*

1) Dommages et responsabilités envers les tiers (atterrissage, abordage, jet);
2) Limites de responsabilité (Limitation forfaitaire, abandon);
3) Assurances.

4e Commission

1) Condition juridique du Commandant et du personnel;
2) Accidents du personnel et assurances;
3) Régime des passagers;
4) Loi applicable aux actes et aux faits à bord de l'aéronef.

Chacune des Commissions, en examinant les questions mises à son ordre du jour, devra s'occuper des difficultés relatives à la compétence, à la prescription ou aux déchéances.

Le Comité recommande à chacune de ces Commissions, dans l'étude complète qu'elle aura à faire des problèmes qui lui sont confiés, de faire porter tout d'abord son examen sur les questions suivantes:

1e *Commission:* Registre Aéronautique, propriété et hypothèque;

2e *Commission:* Lettre de voiture et, éventuellement, examen des modifications qui seraient demandées au Projet de Convention de Paris de 1925;

3e *Commission:* Dommages causés aux personnes et aux biens se trouvant à la surface;

4e *Commission:* Condition juridique du Commandant de l'aéronef.

* * * * *

ENGLISH TRANSLATION OF EXCERPTS FROM COMPLETE PROCEEDINGS OF CITEJA'S FIRST SESSION MAY 1926

* * * * *

RESOLUTION NO. 2

INTERIOR REGULATIONS OF THE COMMITTEE

The Committee decides to adopt the following interior regulations:

* * * * *

Article 4.

The Commissions provided for in Article 2 above will appoint their President and the Reporters for each of the items set down on the Agenda.

The Reporter will prepare, on the item which he has been charged to study, a questionaire addressed to all the members of the Commission, who should, within a period fixed by the Commission at the time the item is placed on the Agenda, send their reply direct to the Reporter as well as a copy to the Secretary of the Committee.

The Reporter will prepare his report, consisting of text preceded by a statement of motives. He will send his report to the Secretary of the Committee for distribution to all the members of the Commission.

The Commission will then meet on convocation by its President in order to study the reports made and to pre-

pare a text to be submitted to the Committee. It will thereupon designate the Reporters charged with the presentation of its conclusions to the Committee. It will sit at the place fixed by its President with the concurrence of the President of the Committee.

The text thus prepared will be immediately communicated by the Secretary of the Committee to all the members of the Committee.

* * * * *

Article 7.

After approval by the Committee, the General Report and the draft Conventions will be transmitted to the French Government for communication to all the Governments with a view to an early convocation of the International Conference on Aerial Private Law.

* * * * *

RESOLUTION No. 3.

The Committee of Experts, considering that it is necessary to examine in their entirety the problems of private law raised by air navigation, decides to appoint four Commissions composed of eleven Members.

Each Commission will make a study of the following questions:

1st Commission.

(1) Nationality of aircraft;
(2) Aeronautical register;
(3) Ownership, co-ownership, construction and transfer;
(4) Vested rights, mortgages, privileges and seizures.

2nd Commission

(1) Category of transport (commercial transport, private pilots, etc. . . .);

(2) Way-bill;
(3) Responsibility of carriers towards consignors of goods and towards passengers;
(4) Jettisoning of cargo and general damage;
(5) Hiring of aircraft.

3rd Commission

(1) Damage and responsibility towards third parties (landing, collision, jettison);
(2) Limits of responsibility (contractual limitation, abandonment);
(3) Insurance.

4th Commission

(1) Legal status of the commander and crew;
(2) Accidents to the crew, and insurance;
(3) Status of passengers;
(4) Law applicable to acts committed on board the aircraft.

Each of these Commissions, in examining the items set down on its Agenda, should take up the matter of difficulties relating to competency, prescription or forfeiture.

The Committee recommends to each of these Commissions, in the complete study it will have to make of the problems which are confided to it, to bring its examination to bear in the first place on the following questions:

1st Commission: Aeronautical register, ownership and mortgages;
2nd Commission: Way-bill and, eventually, examination of the modifications to be asked for in the Paris draft Convention of 1925;
3rd Commission: Damage caused to persons and property on the surface;
4th Commission: Legal status of the Commander of the aircraft.

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APPENDIX D

COMITÉ INTERNATIONAL TECHNIQUE D'EXPERTS JURIDIQUE AÉRIENS

COMPTE – RENDU DE LA 2e SESSION

AVRIL 1927

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[Compte-rendu provisoire de la deuxième seánce du CITEJA (5 Avril)]

[page 24] M. COGLIOLO (Italie) formule une critique contre le paragraphé 2 de l'article 3, ainsi rédigé:

"L'absence, l'irrégularité ou la perte de ce "titre, ne préjudicie ni à l'existence, ni à la validité "du contrat de transport".

On conçoit que la perte de la lettre de transport aérien ne préjudicie pas à l'existence du contrat de transport car il en est de même pour la perte d'une lettre de change. Mais, en ce qui concerne l'absence ou l'irrégularité de la lettre de transport, M. COGLIOLO doute, pour une raison de forme et pour une raison de fond, de l'utilité de l'article qui déclare que cela ne préjudicie pas à l'existence ou à le validité du contrat. La raison de forme est que c'est diminuer singulièrement la valeur de la lettre de transport aèrien que de dire, dans un article qui règle toute la question, que son absence ne préjudicie ni à l'existence, ni à la validité du contrat de transport. La raison de fond est qu'il est nécessaire de résoudre la question, très fréquente en droit maritime en ce qui concerne le connaissement. M. COGLIOLO se demande s'il ne serait pas préférable de dire que le transporteur a le droit de demander à l'expéditeur l'établissement de la lettre de transport aérien et que l'expéditeur a le droit de le demander également, mais que, pour les transports internationaux, une lettre de transport aérien est obligatoire.

M. DE VOS, Rapporteur, expose que l'observation de M. COGLIOLO est précisément un des points qui ent soulevé le plus de difficultés lors de l'examen par la Commission. Il a para impossible à certaines délègations, et notamment à la Délégation Britannique, d'introduire l'obligation de la lettre de transport aérien pour tous les transports. Cette Délégation estime très difficile de faire accepter par la législation britannique l'établissement d'une sanction pénale adéquate correspondant à cette obligation. Les experts britanniques ont fait observer qu'en n'imposant pas le principe de l'obligation le résultat pratique serait néanmoins le même. Pour eux, il serait possible d'arriver au même résultat de la manière suivante:

1°—les transporteurs doivent être poussés à se servir d'une lettre de transport aérien chaque fois qu'ils font un contrat de transport aérien international sans toutefois qu'il soit rendu illégal de s'en dispenser.

2°—si le transporteur se sert d'une lettre de transport, ce document doit (sans qu'il soit toutefois illégal de les omettre) contenir certaines mentions essentielles (mentions numérotées de a) à g) à l'article 7 du projet de convention).

3°—la méthode à adopter pour atteindre ces deux buts devrait être de rendre matériellement avantageux aux transporteurs de faire usage d'une lettre de transport aérien contenant les mentions essentielles et de les mettre dans une situation moins favorable s'ils préférent conclure un contrat de transport sans lettre de transport ou sans les mentions essentielles.

[page 25] En conséquence, la Délégation Britannique a proposé à la Commission:

a) que la convention stipule que si un contrat de transport est conclu, sans l'établissement d'une lettre de transport aérien contenant les mentions essentielles, le transporteur perdra les avantages que lui sent conférés par les articles 5, 6 et 7 de l'avant-projet de Convention sur la responsabilité (sans toutefois porter atteinte aux autres dispositions dudit avant-projet) et qu'un tel contrat, en ce que concerne les matières aux-quelles ont trait los articles précités, est régi par le droit commun.

La sanction sera de cette façon non seulement automatique, uniforme et universelle, mais elle se trouvera dans le cadre même de la Convention.

b) qu'il soit annexé à la Convention un modèle de lettre de transport dont l'usage serait recommandé.

Il a paru à la Commission que cette conception, très différente évidemment des conceptions latines, pouvait être fort utile et qu'en acceptant ce minimum d'obligations, il était possible d'obtenir l'unanimité et de faire adopter la lettre de transport aérien.

D'autre part, si la mention, au second alinéa de l'article 3, du mot "absence" semble indiquer une contradiction et que, dès qu'il s'agit de régler l'existence de la lettre de transport aérien, on ne devrait pas parler de son absence, il n'y a là qu'une apparence. Le maintien du mot "absence" indique simplement que la lettre de transport n'est pas obligatoire et que le transport reste valable même sans ce document.

M. PITTARD (Suisse) ajoute que si le mot "absence" n'était pas maintenu, le transporteur ne ferait pas de lettre de transport pour échapper à la convention; tandis qu'avec le maintien du mot "absence" le transporteur reste soumis à la Convention et l'on vise ainsi le transport privé d'un individu faisant exceptionnellement un transport contre rémunération.

M. RIPERT (France) rappelle qu'il a été prévu, par la Deuxième Commission, à l'article 16 de l'avant-projet de convention, une sanction très énergique contre celui qui ne fera pas de lettre de transport: cette sanction consiste en ce que les dispositions de la convention s'appliqueront à lui en tant qu'elle lui sont défavorables et qu'il ne pourra réclamer les exonérations contenues dans la Convention.

Le Président propose de réserver le paragraphe 2 de l'article 3 jusqu'à la discussion de l'article 16, dont il vient d'être parlé. Il en est ainsi dècidé.

* * * * *

[page 27] Le Président passe à l'article 7, dont il donne lecture:

"La lettre de voiture contient les mentions suivantes:

"a) le lieu où le document a été crée et la date à laquelle il a été établi;

"b) les point de depart et de destination

"c) l'itinéraire à suivre, les point d'escale de transbordement:

"d) le [n]om et l'adresse de l'expéditeur;

"e) le [nom] et l'adresse du transporteur;

"f) le [nom] et l'adresse du destinataire, à moins que l'expéditeur ne se réserve le droit de la désignor ulterieurement;

"g) la nature de la marchandise

[page 28]

"h) le nombre, le mode d'emballago, les marques particulières ou les numéros des colis;

"i) le poids, la quantité, la contenance ou la dimension de la marchandise;

"k) le prix du transport, s'il est stipulé, la date et le lieu de paiement, et la personne qui doit payer;

"l) la désignation par l'expéditeur de la valeur de la merchandise de l'interēt de la livraison;

"m) le nombre d'exemplaires de la lettre de voiture;
"n) les documents transmis au transporteur pour accompagner la lettre de voiture.

"Les mentions indiqués sous les lettres a) à g) doivent ẽtre obligatoirement inscrites dans la lettre "de voiture."

M. DE VOS, Rapporteur, fait remarquer qu' à propos de la convention sur la responsabilité il a été décidé d'ajouter après le mot "itinéraire" le met "prévu", attendu qu'il n'appartient à personne d'indiquer un itinéraire fixe, l'itinéraire comprenant : le point de départ, les escales et le point de destination prévu. Il demande donc qu'il soit adjouté le mot "prévu".

Le Président interrege le Comité sur ce point. Aucune objection n'étant faite, il est décidé que le mot "prévu" sera ajouté.

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[page 30) Le Président donne lécture de l'article 8, ainsi conçu :

"La lettre de voiture doit contenir une clause "stipulant que le transport est soumis au régime de la "responsabilité établie par la Convention Internationale "du 6 Novembre 1925, ainsi que les dispositions principales "de celle-ci."

A la suite d'un échange de vues auquel prennent part M. RICHTER (Allemagne), M. COGLIOLO (Italie) et le Rapporteur, il est décidé que le texte de l'article 8 sera ainsi rédigé :

"La lettre de voiture doit centenir une clause stipulant que le transport est soumis au régime de la responsabilité établie par la Convention International du . . . . . ."

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[page 40] [Troisième Séance de CITEJA (6 Avril)]

Le Président soumet au Comité l'article 16, ainsi rédigé :

"Si une lettre de voiture contenant toutes les mentions indiquées par l'article 7, lettres a) à g), et par l'article 8 n'a

pas été délivrée pour un transport international, le transporteur n'en sera pas moins soumis aux règles de la Convention Internationale sur la responsabilité, mais le transporteur n'aura pas le droit de se prévaloir des dispositions de ladite Convention qui l'exenèrent de se responsabilité ou des fautes de sos préposés ou qui établissent une limitation de responsabilité."

M. YOUPIS (Grèce) estime que la sanction prévue par cet article et qui consiste à priver le transporteur de tous les avantages de la convention se comprend pour une Compagnie puisante, mais que pour un particulier faisant accidentellement un transport international de marchandises l'absence de limitation de la responsabilité serait, à son avis, une sanction trop sévère.

M. PITTARD (Suisse) ne partage pas set avis. La limitation de la responabilité a été cevisagée pour amener à la conclusion d'une assurance, si un transporteur accidentel de marchandises vont s'assurer, il n'a qu'a limiter sa responsabilité au moyen d'une lettre de transport. Il y a là une barrière très utile obligeant les transporteurs à rentrer dans le cadre de la covention.

M. PINEDA DE MONT (Guatémala) appuie cette manière de voir.

Le Comité consulté par le Président, décide d'adopter le text de l'article 16 qu'il a été présenté.

Le Président signale au Comité qu'il y a lieu de reprendre le paragraphe 2 de l'article 3 qui avait été réservé:

"L'absence, l'irrégularité ou la perte de ce titre, ne préjudicie ni à l'existence, ni à la validité du contrat de transport."

Le Président rappelle que le Comité est en préscence de deux propositions:

[page 41]-l'une formulée par M. COGLIOLO, consistant dans la suppression pure et simple du deuxième paragraphe de l'article 3.

—l'autre, formulée par le Rapporteur, maintenant l'article 3 tel qu'il est présenté, le Sous-Comité de Rédaction devant trouver une rédaction nouvelle atténuée en ce qui concerne le mot "absence".

M. DE LAPRADELLE (France) estime que le texte tel qu'il est rédigé, sans modification, se comprend parfaitement : l'absence, l'irrégularité ou le perte du titre n'atténue pas l'existence du contrat de transport.

M. AMBROSINI (Italie) propose de supprimer ce deuxième paragraphe et de le mettre dans l'exposé des motifs.

M. DE VOS, Rapporteur, fait remarquer que ce texte n'est pas une simple explication mais s'impose pour la traduction en certaines langues, notamment en anglais. Si le premier alinén est seul traduit, on ne sait pas s'il constitue ou non une obligation. La deuxième phrase est nécessaire pour voir que ce n'est pas une obligation.

Le Comité, consulté par le président, repousse la suppression du paragraphe 2 de l'article 3 et veto l'article 3 tel qu'il a été présenté.

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ANNEXE "A"

RAPPORT

DE LA DEUXIEME COMMISSION DU COMITE INTERNATIONAL TECHNIQUE D'EXPERTS JURIDIQUES AERIENS SUR LA LETTRE DE VOITURE AERIENNE

[30 Mars 1927]

* * * * *

[Annexe page 2] La Convention n'impose pas l'obligation d'une lettre de voiture; mais dès qu'une lettre de voiture existe, les dispositions de la Convention s'y appliquent.

Cette formule a été admise par la Commission en vue d'aboutir à une adoption unanime des règles de la Convention, bien que certains membres aient été d'avis que le transport devrait être constaté obligatoirement par une lettre de voiture. Le système adopté constitue un minimum, rencontrant l'opinion émise notamment par les Délégations allemande et britannique qui ont estimé qu'en cette matière il convient de laisser les parties libres de sauvegarder leurs intérêts.

Le délégué de la Grande-Bretagne a fait ressortir en outre la difficulté qui existe dans certains pays de sanctionner efficacement cette obligation.

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[Annexe page 3] 4°—En ce qui concerne les mentions à insérer dans la lettre de voiture, la Commission a adopté le système suivant :

Il existe dans certains pays des difficultés pour édicter des sanctions efficaces en vue d'assurer l'exécution de certaines dispositions de la Convention. Il ne sert de rien de rendre ces dispositions obligatoires si une sanction adéquate n'y correspond. Ces dispositions peuvent, du reste, être très utiles.

Parmi les mentions à insérer dans la lettre de voiture, il y a celles qui indiquent qu'il s'agit d'un document couvrant un transport international, celles prévues sous les lettres a)—f); elles sont [Annexe page 4] indispensables au point de vue de l'exécution de la Convention.

Il en est de ême de la mention sous la lettre g) : la nature de la marchandise, parce que des prohibitions peuvent être édictées par certains pays quant à l'entrée ou à la sortie de marchandises.

Les autres mentions de h) à n) présentent une utilité incontestable, mais leur omission ne peut être, suivant certaines conceptions nationales, utilement sanctionnée. Il est

hautement recommandable que la lettre de voiture porte ces mentions, mais leur insertion dépendra surtout de l'intérêt même qu'ont les parties de les indiquer dans le document formant titre.

Ces mentions, du reste, ne sont pas limitatives. Il peut être utile, par example, dans certains cas, de donner l'indication de l'appareil qui transporte la marchandise.

* * * * *

[Annexe page 7] 10°—Quant aux sanctions, la difficulté pour certaines conceptions nationales de prévoir des [Annexe page 8] mesures adéquates en vue d'assurer l'observaton de certaines dispositions de la Convention a déjà été signalée. La Commission à cet égard s'est ralliée à l'opinion émise par la Délégation britannique qu'on ne peut imposer une règlementation en cette matière par le moyen de sanctions pénales. Elle a admis un système qui apparait comme éminemment pratique et qui consiste à sanctionner l'obligation découlant des articles 7 et 8 par la perte éventuelle des avantages qui sont conférés aux parties par certains articles du projet de convention sur la responsabilité du transporteur.

Les parties ont donc tout intérêt à faire usage d'une lettre de voiture contenant les mentions essentielles.

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AVANT-PROJET [*]
DE CONVENTION SUR LA LETTRE DE VOITURE AERIENNE

* * * * *

ARTICLE 3—Le transport international d'une marchandise est constaté par un titre, appelé : lettre de voiture aérienne.

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* Attached to preceding report of CITEJA Second Commission.

L'absence, l'irrégularité ou la perte de ce titre, ne préjudicie ni à l'existence, ni à la validité [page 2] du contrat de transport.

* * * * *

[page 3] ARTICLE 7—La lettre de voiture contient les mentions suivantes :

a) le lieu où le document a été créé et la date à laquelle il a été établi;
b) les points de départ et de destination;
c) l'itinéraire à suivre, les points d'escale de transbordement;
d) le nom et l'adresse de l'expéditeur;
e) le nom et l'adresse du transporteur;
f) le nom et l'adresse du destinataire, à moins que l'expéditeur ne se réserve le droit de le désigner ultérieurement;
g) la nature de la marchandise;
h) le nombre, le mode d'emballage, les marques particulières ou les numéros des colis;
i) le poids, la quantite, la contenance ou la dimension de la marchandise;
k) le prix du transport, s'il est stipulé, la date et le lieu de paiement, et la personne qui doit payer;
l) la désignation par l'expéditeur de la valeur de la marchandise, de l'intérêt de la livraison;
m) le nombre d'exemplaires de la lettre de voiture;
n) les documents transmis au transporteur pour accompagner la lettre de voiture.

Les mentions indiquées sous les lettres a) à g), doivent être obligatoirement inscrites dans la lettre de voiture.

[page 4] ARTICLE 8—Le lettre de voiture doit contenir une clause stipulant que le transport est soumis au régime de la responsabilité établie par la Convention Interna-

tionale du 6 Novembre 1925, ainsi que les dispositions principales de celle-ci.

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[page 7] ARTICLE 16—Si une lettre de voiture contenant toutes les mentions indiquées par l'article 7, lettres a) à g), et par l'article 8 n'a pas été délivrée pour un transport international, le transporteur n'en sera pas moins soumis aux règles de la Convention Internationale sur la responsabilité, mais le transporteur n'aura pas le droit de se prévaloir des dispositions de ladite Convention qui l'exonèrent de sa responsabilité on des fautes de ses préposés ou qui établissent une limitation de responsabilité.

* * * * *

Annexe "B"

RAPPORT

DE LA DEUXIEME COMMISSION DU COMITE INTERNATIONAL TECHNIQUE D'EXPERTS JURIDIQUES AERIENS SUR LES OBSERVATIONS & PROPOSITIONS DE MODIFICATIONS RELATIVES A L'AVANT-PROJET DE CONVENTION SUR LA RESPONSABILITE DU TRANSPORTEUR AERIEN.

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[Annexe page 5] *Article 8.*

A l'occasion de est article, la Commission a été d'accord pour reconnaitre la nécessité d'indiquer par une dispositon spéciale que les règles de la Convention concernant la limitation ne peuvent pas s'appliquer si la victime ou ses ayante-droit preuvent qu'il y a eu un acte illicite intentionnel du transporteur.

Dans le même ordre d'idéas: non applicabilité de la convention sur la limitation, il a été signalé qu'il y avait lieu de prévoir un texte contenant la sanction civile admise en cas d'infraction aux articles 7 et 8 de la convention sur la lettre de transport aŕien.

Au même article, il a été décidé de remplacer l'expression "d'aprés la législation nationale du défunt" par celle de "le statut personnel du défunt" qui est plus exacte.

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Annexe C

Resolutions (No. 5 à 15) prises par le Comité dans sa Deuxième Session

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[page 7] **RESOLUTION NO. 12**

Le Comité décide d'approuver le texte ciaprès d'avant-projet de Convention sur la lettre de transport aérien, proposé par le Sous-Comité de Rédaction:

AVANT-PROJET DE CONVENTION SUR LA LETTRE DE TRANSPORT AERIEN

* * * * *

Article 4.

[page 8] Tout transporteur a le droit de demander à l'expéditeur l'établissement et la remise d'un titre appelé; lettre de transport aérien; tout expéditeur a le droit de demander au transporteur l'acceptation de ce document.

Tontefois, et sous réserve des dispositions de l'article 15, l'absence, l'irrégularité ou la perte de ce titre, ne préjudicie ni à l'existence, ni à la validité du contrat de transport.

Le transmission de la lettre de transport aérien ne suffit pas; à elle seule, à donner le droit de disposer de la marchandise.

* * * * *

RESOLUTION NO. 13

Le Comité décide que le projet de texte de Convention sur la lettre de transport aérien tel qu'il est sorti des déliberations du C.I.T.E.J.A. ainsi que les modifications proposées à la Convention sur la Responsabilite du Transporteur Aérien, telles qu'elles ont été examinées par la Deuxiéme Commission, sont renvoyés à ladite Commission, en vue d'envisager la possibilité de rédiger une convention unique, étant entendu qu'il sera demandé au préalable aux Délégations leur avis sur toute modification à apporter à la convention sur la responsabilité, ainsi qui sur l'opportunité de fusionner les deux Conventions.

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ENGLISH TRANSLATION OF EXCERPTS FROM COMPLETE PROCEEDINGS OF CITEJA'S SECOND SESSION

APRIL 1927

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Mr. Cogliolo (Italy) offered a critique of Article 3(2), which reads as follows:

"The absence, irregularity, or loss of the transportation document shall not prejudice the existence or the validity of the contract of transportation."

It can be understood that the loss of the air waybill is not prejudicial to the existence of a contract of transportation, since the same applies to the loss of a bill of exchange. But with regard to the absence or irregularity of the air waybill, Mr. Cogliolo, based on a reason of form as well as on one of substance, questioned the usefulness of the article, which states that this is not prejudicial to the existence or the validity of the contract. The reason of form was that in an article that deals with the entire issue, saying that the absence of the air waybill is not prejudicial to the existence or the validity of the contract of transportation particularly diminishes the value of that air waybill. The reason of substance was the need to resolve the question, very frequent in maritime law in terms of bills of lading. Mr. Cogliolo wondered whether it would not be preferable to say that the carrier was entitled to ask the consignor to make out an air waybill and that the consignor was entitled to ask for one also, but that for international transportation an air waybill was compulsory.

Mr. de Vos, Rapporteur, stated that Mr. Cogliolo's observation was precisely one of the points that raised the most difficulties in the course of the review by the Commission. It seemed impossible to some delegations, in particular the British delegation to introduce the obligation of the air waybill for all transportation. The British delega-

tion considered that it would be very difficult to get British law to accept the establishment of an appropriate penalty connected with this obligation. British experts noted that without imposing the principle of obligation, the practical result would still be the same. In their opinion, it would be possible to arrive at the same result in the following way:

1. The carriers must be urged to use an air waybill whenever they draw up an international contract of transportation, without it being made illegal for failure to do so.

2. If the carrier uses a waybill, this document must contain certain essential particulars (without it being illegal to omit them however), which are lettered (a) through (g) in Article 7 of the draft convention.

3. The method to be adopted in order to reach these two goals should be to make it materially worthwhile for the carriers to use an air waybill containing essential particulars and to put them in a less favorable situation if they prefer to draw up a contract of transportation without a waybill or the essential particulars.

Consequently, the British delegation proposed the following to the Commission:

(a) that the convention stipulate that if a contract of transportation is concluded, without an air waybill containing the essential particulars being made out, the carrier loses the advantages conferred on him by Articles 5, 6, and 7 of the draft Convention on liability (without affecting the other provisions of the draft, however) and that such a contract, with regard to the matters with which the above-mentioned articles are concerned, is governed by ordinary law.

The penalty would thus be not only automatic, uniform, and universal, it would also be found within the very context of the convention.

(b) that a model of a waybill, the use of which would be recommended, be included as an annex to the convention.

It seemed to the Commission that this conception, very different obviously from the Latin conceptions, could be very useful and that by accepting this minimum level obligations, it was possible to obtain unanimity and to have the air waybill adopted.

Furthermore, although mention of the word "absence" in Article 3(2) seems to indicate a contradiction and although it seems that when regulating the existence of the air waybill, its absence should not be discussed, this is only the way it seems. Retaining the word "absence" indicates simply that the waybill is not compulsory and that the transportation remains valid even without that document.

Mr. Pittard (Switzerland) added that if the word "absence" was not retained, the carrier would not draw up a waybill in order to evade the convention; but if the word "absence" was retained, the carrier would remain subject to the convention and the private transportation by an individual who under exceptional circumstances carried goods for payment would thus also be covered.

Mr. Ripert (France) noted that the Second Commission had established in Article 16 of the draft convention a very harsh penalty against anyone not seeking out a waybill: under this penalty, the provisions of the convention unfavorable to him would apply and he would not be able to claim the exemptions contained in the convention.

The Chairman proposed to reserve Article 3(2) until Article 16, which had just been mentioned, was discussed. It was so decided.

* * * * *

The President went on to Article 7, which he read:

The air waybill shall contain the following particulars:

(a) The place and date of its execution;

(b) The place of departure and of destination;

(c) The itinerary to be followed, the stopover points for transshipment;

(d) The name and address of the consignor;

(e) The name and address of the carrier;

(f) The name and address of the consignee, unless the consignor reserves the right to indicate the former at a later time;

(g) The nature of the goods;

(h) The number of packages, the method of packing, and the particular marks or numbers upon them;

(i) The weight, quantity, capacity, or dimensions of the goods;

(k) [sic] The freight, if it has been agreed upon, the date and place of payment, and the person who is to pay it;

(l) The indication by the consignor of the value of the merchandise, the value of the delivery;

(m) The number of parts of the air waybill;

(n) The documents handed to the carrier to accompany the air waybill;

The particulars indicated under letters (a) through (g) must be contained in the air waybill.

Mr. de Vos, Rapporteur, noted that with regard to the convention on liability, it had been decided to add the word "agreed" after [in English before] the word "itinerary," considering that it was no one's responsibility to indicate a fixed itinerary, the itinerary including: the place of departure, the stopovers, and the planned place of destination. He asked therefore that the word "agreed" be added.

The President asked the Committee about this point. No objection having been made, it was decided that the word "agreed" would be added.

* * * * *

The President read Article 8 as follows:

> "The air waybill shall contain a clause specifying that the transportation is subject to the liability rules set forth in the International Convention on November 6, 1925, as well as the principal provision thereof."

After an exchange of views in which Mr. Richter (Germany), Mr. Cogliolo (Italy), and the Rapporteur took part, it was decided that the text of Article 8 would read as follows:

> "The air waybill shall contain a clause specifying that the transportation is subject to the liability rules set forth in the International Convention of. . ."

* * * * *

[page 40] [Third meeting of CITEJA (April 6)]

The President submitted Article 16 to the Committee, as follows:

> "If an air waybill containing all the particulars indicated in Article 7(a) through (g) and Article 8 has not been issued for an international transportation, the carrier shall be no less subject to the rules of the International Convention on Liability, but he shall not be entitled to avail himself of the provisions of said Convention that would exclude his liability or the errors of his employees or that set a limit to the liability."

Mr. Youpis (Greece) thought that the penalty provided in this article, which involved depriving the carrier of all the advantages of the convention, was understandable in the case of a powerful company but that for a private individual performing international transportation of goods on an exceptional basis the absence of a limitation on the liability would, in his opinion, be too severe a penalty.

Mr. Pittard (Switzerland) did not share this view. The limitation of liability had been designed to serve as insurance; if an occasional carrier of goods wanted to insure himself, he had only to limit his liability through a waybill. That was a very useful barrier forcing the carriers to operate within the framework of the convention.

Mr. Piñeda de Mont (Guatemala) supported this point of view.

The Committee, consulted by the Chairman, decided to adopt the text of Article 16 as presented.

The Chairman indicated to the Committee that it was necessary to take up Article 3(2) again, discussion of which had been reserved:

"The absence, irregularity, or loss of the transportation document shall not be detrimental to the existence or the validity of the contract of transportation."

The Chairman reminded the Committee that it was faced with two proposals:

—the one formulated by Mr. Cogliolo involved the elimination pure and simple of Article 3(2);

—the other, formulated by the Rapporteur, involved retaining Article 3 as it appears, with new, attenuated wording with regard to the word "absence" to be found by the Drafting Sub-Committee.

Mr. de Lapradelle (France) thought that the text as drafted, without changes, was perfectly understandable: the absence, irregularity, or loss of the transportation document did not mitigate the existence of the contract of transportation.

Mr. Ambrosini (Italy) proposed eliminating the second paragraph and including it in the explanatory statement.

Mr. de Vos, Rapporteur, noted that this text was not simply an explanation but was essential for the translation into certain languages, particularly English. If the first paragraph alone was translated, it would not be known

whether it constituted an obligation or not. The second sentence was necessary to show that it was not an obligation.

The Committee, consulted by the President, rejected the elimination of Article 3(2) and voted to retain Article 3 as presented.

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Annex "A"

REPORT OF THE SECOND COMMISSION OF THE INTERNATIONAL TECHNICAL COMMITTEE OF AERIAL LEGAL EXPERTS ON THE AIR WAYBILL

[March 30, 1927]

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The Convention does not establish an air waybill as compulsory, but once an air waybill exists, the provisions of the Convention apply thereto.

This approach was accepted by the Commission with a view to achieving the unanimous adoption of the Convention rules, despite the fact that some members were of the opinion that transportation of goods should be always be certified by an air waybill. The system adopted sets a minimum, in keeping with the opinion issued by the German and British delegations, which considered that with regard to this matter, the parties should be left free to safeguard their interests.

* * * * *

4. With regard to the particulars to be contained in the air waybill, the Commission adopted the following system:

Some countries face difficulties in enacting effecting penalties in order to enforce certain provisions of the Convention. It accomplishes nothing to make these provisions compulsory if an adequate penalty cannot be imposed to enforce them. These provisions can, moreover, prove extremely useful.

Among the particulars to be contained in the air waybill are those indicating that it is a document pertaining to *international* transportation, that is, items (a) through (f); they are essential from the standpoint of the enforcement of the Convention.

Also essential is item (g)—the nature of the goods—inasmuch as prohibitions on the entry or exit of goods may be decreed by some countries.

The other particulars, (h) through (n), are indisputably useful, yet their omission cannot, in the view of certain nations, be effectively penalized. It is highly recommended that the air waybill include these particulars, but their inclusion shall depend, above all, on the interest of the parties in including them in this document.

Furthermore, these particulars are non-restrictive. It may be useful, for example, in certain cases, to specify the aircraft transporting the goods.

* * * * *

[Annex page 7] 10. With respect to penalties, the difficulties faced by certain nations in instituting adequate measures to ensure the enforcement of certain provisions of the Convention has already been mentioned. In this regard, the Commission concurred with the opinion issued by the British delegation which asserted that this matter cannot be regulated by means of penalties. The Commission agreed to a system which seems extremely practical and which consists in enforcing the obligations deriving from Articles 7 and 8 by means of possible loss of the

benefits granted to the parties by certain articles, in the Draft Convention, on the liability of the carrier.

It is therefore in the best interests of the parties to use an air waybill containing the essential particulars.

* * * * *

PRELIMINARY DRAFT OF CONVENTION ON THE AIR WAYBILL

* * * * *

Article 3. The international transportation of goods shall be certified by a document called an "air waybill."

The absence, irregularity, or loss of this document shall not prejudice the existence or validity of the contract of transportation.

* * * * *

Article 7. The air waybill shall contain the following particulars:

(a) The place and date of its execution;

(b) The place of departure and of destination;

(c) The itinerary to be followed and the stopping places for unloading;

(d) The name and address of the consignor;

(e) The name and address of the carrier;

(f) The name and address of the consignee, unless the consignor reserves the right to indicate this at a later time;

(g) The nature of the goods;

(h) The number of packages, the method of packing, and the particular marks or numbers on them;

(i) The weight, the quantity, and the volume or dimensions of the goods;

[No (j)]

(k) The freight, if it has been agreed upon, the date and place of payment, and the person who is to pay it;

(l) The indication by the consignor of the value of the goods and the significance of the delivery;

(m) The number of parts of the air waybill;

(n) The documents transmitted to the carrier together with the air waybill.

The indication in the air waybill of the particulars set out in (a) through (g) is compulsory.

Article 8. The air waybill shall contain a statement that the transportation is subject to the rules relating to liability established in the International Convention of November 6, 1925, as well as to the main provisions thereof.

* * * * *

Article 16. If an air waybill containing all the particulars set out in Article 7(a) through (g) and by Article 8 has not been made out for international transportation, the carrier shall still be subject to the rules of the International Convention on liability, but the carrier shall not be entitled to avail himself of those provisions of this Convention that exclude his own liability, release him from responsibility for the errors of his agents, or limit his liability.

* * * * *

Annex "B"

REPORT OF THE SECOND COMMISSION OF THE INTERNATIONAL TECHNICAL COMMITTEE OF AERIAL LEGAL EXPERTS ON THE OBSERVATIONS AND PROPOSED MODIFICATIONS CONCERNING THE DRAFT CONVENTION ON THE LIABILITY OF THE AIR CARRIER

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Article 8

Concerning this article, the Commission was in agreement on recognizing the need to indicate by a special pro-

vision that the rules of the convention concerning limitation cannot be applied if the victim or his beneficiaries prove that the carrier intentionally committed an illicit act.

Along the same lines: inapplicability of the convention on limitation; it was pointed out that there was reason to provide a text containing the civil penalty allowed in case of violation of Articles 7 and 8 of the convention on the air waybill.

For the same article, it was decided to replace the expression "according to the national laws of the deceased" by "the personal status of the deceased," which is more precise.

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RESOLUTION NO. 12

The Committee decided to approve the following text of the draft convention on the air waybill, proposed by the Drafting Subcommittee:

PRELIMINARY DRAFT CONVENTION ON THE WAYBILL

* * * * *

Article 4

Every carrier has the right to require the consignor to make out and hand over to him a document called an "air waybill"; every consignor has the right to require the carrier to accept this document.

Nonetheless, and subject to the provisions of Article 15, the absence, irregularity, or loss of this document shall not prejudice the existence or the validity of the contract of transportation.

The transmission of the air waybill shall not, in itself, confer the right to dispose of the goods.

* * * * *

RESOLUTION NO. 13

The Committee has decided that the draft text of the convention on the air waybill, as it emerged from the deliberations of the International Technical Committee of Aerial Legal Experts, together with the proposed modifications to the convention on the liability of the air carrier, as they were examined by the Second Commission, shall be sent to that Commission with a view to considering the possibility of drafting a single convention, with the understanding that the opinion of the delegations will first be sought concerning any modification to be made to the convention on liability and the appropriateness of combining the two conventions.

APPENDIX E

COMITÉ INTERNATIONAL TECHNIQUE D'EXPERTS JURIDIQUE AÉRIENS

COMPTE-RENDU DE LA 3ème SESSION

MAI 1928

* * * * *

[Compte rendu de la deuxiéme séance de (CITEJA (24 Mai)]

[page 23] CHAPITRE II

Titres de transport. – Section I. – Billet de passage

ARTICLE 3.

Paragraphe premier.

«Dans le transport de voyageurs, le transporteur est tenu de délivrer un billet de passage qui doit contenir les mentions suivantes:

a) le lieu et la date de l'émission,

b) les points de départ et de destination,

c) l'indication sommaire de la voie á suivre (*via*), ainsi que les points d'arrêts prévus,

d) le nom et l'adresse du ou des transporteurs.

Le Rapporteur rappelle que l'I.A.T.A. a formulé certaines observations au sujet de cet article 3:

La premiére observation demande la suppression sur billet de passage des points d'arrêts prévus.

Le Rapporteur donne lecture des arguments donnés à ce sujet par l'I.A.T.A.:

«Il ne convient pas que le billet de passage contienne aussi les points d'arrêts prévus. Il y a aujourd'hui déjà des communications aériennes journaliéres entre deux endroits avec arrêts prévus et sans arrêts prévus. Nous renvoyons à ce sujet à la ligne aérienne réguliére de la

Deutsche Luft Hansa, entre Berlin et Zurich, qui se pratique chaque jour en partie avec arrêts à Halle, Leipzig, Erfurt et Stuttgart, en partie sans arrêt. Le trafic aérien doit tâcher d'organiser d'une facon égale, alternativement, des communications directes et des communications avec arrêts. Quoique le billet de passage indique régulièrement une heure fixe, il arrive cependant fréquemment qu'il y soit apporté des changements. Etant donné que plusieurs stations sont très surchargées, l ne peut être garanti, qu'en cas de pareils changements, les arrêts tels qu'ils sont indiqués sur le plan soient ajoutés ou biffés.

«D'aprés les termes de l'article premier, il importe seulement de marquer sur le billet de passage, les points d'arrêts indiqués sur le plan qui sont situés dans un pays, dans lequel ne se trouvent pas en même temps le point de départ [page 24] et le point d'arrivée. Par conséquent, si maintenant des arrêts prévus doivent être mentionnés dans le billet de passage, cela ne peut concerner que les derniers ponts d'arrêts.

«En faisant cette proposition, nous voudrions qu'on considère que les sociétés de trafic aérien ne disposent pas dans les stations respectives d'un personnel aussi nombreux que, par exemple, les chemins de fer et les compagnies de navigation. C'est pourquoi, il est nécessaire que le personnel soit déchargé de tout travail d'écriture qui n'est pas absolument indispensable. Cela importe principalement, si de la délivrance défectueuse d'un billet de passage, il peut résulter pour la société de trafic aérien quelque préjudice.»

L'I.A.T.A. a formulé une seconde proposition : l'addition du numéro du bulletin de bagage sur le billet de passage.

La première de ces propositions : suppression de la lettre *c*) a déjà été étudiée antérieurement par les Experts qui l'ont discutée et rejetée, le Rapporteur ne la retient donc

pas. La seconde proposition résulte de la pratique et paraît intéressante : l'article 4 prévoyant le numéro du billet de passage, il serait possible de prévoir que le numéro du bulletin de bagage serait porté sur le billet de passage. Toutefois, au point de vue de la convention, cette proposition ne présente pas d'intérêt juridique, elle ne présente d'utlité que pour le transporteur, aussi mettra-t-il cette mention sur le billet que cela soit dit dans la Convention ou non.

Le Président demande au Comité s'il entend retenir cette suggestion qui ne semble pas avoir sa place dans le texte de la Convention.

Aucune autre observation n'étant faite sur le paragraphe premier, et la suggestion de l'I.A.T.A. n'étant pas retenue, le paragraphe premier de l'article 3 mis aux voix est adopté.

Paragraphe 2

«Le billet de passage doit contenir, en outre, une clause stipulant que le transport est soumis au régime de la responsabilité établi par la présente Convention.»

M. PITTARD rappelle qu'il a été entendu que des modèles des billets seraient annexés à la Convention ainsi qu'il en a été fait pour la Convention de Berne relative aux chemins de fer. Ces modèles doivent comporter le minimum d'indications, les Compagnies étant libres d'ajouter toutes celles qui leur paraissent utiles.

Le Rapporteur indique que la chose est formellement prévue à l'article 19.

Le paragraphe 2 est alors mis aux voix et adopté.

Paragraphe 3

«L'absence, l'irrégularité ou la perte de ce titre de transport ne préjudicie ni à l'existence ni à la validité du contrat de transport.»

Aucune observation n'étant présentée, le paragraphe 3 est adopté.

Paragraphe 4

«Si, pour un transport international, le transporteur accepte le voyageur sans qu'il ait été établi un billet de passage contenant les mentions indiquées ci-dessus, le contrat de transport n'en sera pas moins soumis aux règles de la [page 25] présente Convention, mais le transporteur n'aura pas le droit de se prévaloir des dispositions de cette Convention qui excluent en tout ou en partie sa responsabilité directe ou dérivée des fautes de ses préposés.»

M. YOUPIS croit devoir signaler que la sanction prévue dans ce paragraphe est trop sévére lorsqu'il s'agit d'une simple omission. Il est dit, en effet, «sans qu'il ait été établi un billet de passage contenant les mentions indiquées cidessus. . . » L'absence de l'indication du lieu d'émission ou de la date par exemple, retirera au tansporteur le droit de se prévaloir des dispositions qui l'exonèrent de la responsabilité. Il demande que l'on ajoute, à la fin de l'alinéa 4, la phrase suivante : «Si ce billet de passage ne contient pas l'une des mentions indiquées ci-dessus, le transporteur n'aura ce droit que dans la mesure où aucun dommage n'aura été causé aux voyageurs».

M. PITTARD estime que la Convention doit se défendre elle-même. Cette question a été étudiée à fond. S'il y a omission d'une des mentions exigées il y a faute professionnelle et il est nécessaire qu'elle entraîne une sanction.

La Rapporteur ajoute, qu'ainsi que vient de l'indiquer M. PITTARD, de longues discussions antérieures ont abouti au texte actuellement proposé ; la seule sanction pratique qui a été trouvée est celle qui dérive de la Convention même. Ces ommission que M. YOUPIS considére comme légères ne le sont pas en fait : Tout ce qui est indiqué comme mentions obligatoires ayant une grande importance. Il rappelle que M. le Professeur COGLIOLO a dit, antérieurement à ce sujet :

«Un service de transport publics doit toujours avoir ses papiers en règle et on doit être plus sévère pour lui que pour un simple oubli d'un voyageur.»

M. YOUPIS persiste à trouver que le texte actuel est trop sévère et qu'il pourrait être atténué dans le sens indiqué par lui lorsque personne n'a été lésé.

La Rapporteur maintient le texte de la Commission Il rappelle que cette disposition, qui a été souvent attaquée au cours des discussions précédentes a toujours été maintenue pour la raison suivante : il s'agit là de la disposition essentielle de la Convention Ce texte représente, en effet, une transaction entre les diverses opinions des Délégations des Gouvernements au C.I.T.E.J.A. : certains délégués demandaient que le titre fut obligatoire, d'autres réclamaient une sanction civile, d'autres encore, une sanction pénale. Le texte finalement adopté est d'inspiration britannique. il consititute une transaction acceptée par tous les membres de la Commission. Si ce texte tombe, il est à craindre que ce soit toute la Convention qu'il faille remettre en discussion.

M. Youpis maintient son amendement auquel il donne la forme définitive suivante : «Si le billet de passage ne contient pas l'une quelconque des mentions indiquées cidessus, le transporteur n'aura ce droit que si et dans la mesure où un dommage est causé de ce fait au voyageur.»

L'amendement, mis aux voix, n'est pas adopté.

Le Président met aux voix le paragraphe 4, tel qu'il est rédigé. Le paragraphe 4 est adopté.

L'article 3, dans son ensemble, est alors adopté.

[page 26] **Section II. – Bulletin de Bagages**

ARTICLE 4

Paragraphe premier

«Dans le transport de bageges, autres que les menus objets personnels dont le voyageur conserve la garde, le transporteur est tenu de délivrer un bulletin de bagages.»

Aucune observation n'étant présentée, le paragraphe Ier est mis aux voix et adopté.

Paragraphe 2

«Le transporteur est déchargé de sa responsabilité par la livraison des bagages au porteur du bulletin.»

M. RIPERT remarque que ce texte semblerait vouloir dire qu'il n'y a aucune réclamation possible après la délivrance des bagages. Il croit que l'on a voulu dire, simplement, que le transporteur est libéré quand il a remis les bagages au porteur du bulletin et que la question de responsabilité pour les bagages proprement dits n'a pas été réglée doit l'être comme pour les marchandises.

Le Président estime qu'en il s'agit, en la circonstance, de la personne qui peut être qualifiée pour prendre livraison des bagages. Il propose alors de rédiger le texte de la manière suivante : « La livraison des bagages au voyageur se fait valablement au porteur de bulletin.»

Cette rédaction, mise aux voix, est adoptée.

Paragraphe 3

«Le bulletin de bagages est établi en deux exemphaires.»

M. WOLTERBEEK MULLER (Pays-Bas) estime qu'il est inutile de dire dans la Convention qu'il y aura deux exemplaires du bulletin de bagage. Le transporteur le fera s'il veut, mais il doit y avoir un seul exemplaire prévu : l'exemplaire pour le voyageur.

M. RIPERT répond qu'on pourrait faire le même raisonnement pour la lettre de transport aérien : le titre du transporteur accompagne les marchandises ou les bagages, il n'est donc pas inutile qu'il y ait un exemplaire qui lui reste.

M. RICHTER ajoute que si le voyageur perd son billet de bagages, il peut demander la production de l'autre exemplaire et faire la preuve avec ce second exemplaire.

Sous le bénéfice de ces explications, le Président met aux voix le paragraphe 3, qui est adopté.

Paragraphe 4

* * * * *

Il doit contenir les mentions suivantes :

«*a*) le lieu et la date d'émission.

«*b*) les points de depárt et de destination;

[page 27] «*c*) l'indication sommaire de la voie à suivre (via) ainsi que les points d'arrêts prévus,

«*d*) le nom et l'adresse du ou des transporteurs.

«*e*) le numéro du billet de passage,

«*f*) l'indication que le bulletin est établi en deux exemplaires.»

M. PITTARD faït remarquer que si, tout à l'heure, on a demandé de mettre le numéro du bulletin de bagages sur le billet de passage, la Commission demande, l'estimant

préférable, de mettre le numéro du billet de passage sur le bulletin de bagages.

Aucune observation n'étant présentée, le paragraphe 4 est adopté.

Paragraphe 5

«Le bulletin de bagages doit contenir une clause stipulant que le transporteur est déchargé de sa responsabilité par la livraison des bagages au porteur du bulletin.»

M. RIPERT remarque que la rédaction de ce paragraphe semble indiquer que le bulletin de bagages constitue un titre au porteur avec le droit, pour la compagnie de transports, de livrer les bagages au porteur du bulletin, sans que l'on ait rien prévu sur l'opposition possible du voyageur interdisant de livrer les bagages au porteur. Tout porteur d'un bulletin de bagages, quelle que soit la facon dont il s'est muni de ce bulletin peut prendre les bagages. Le Comité crée là un titre au porteur. Ce n'est pas ce que l'on a voulu dire.

M. RICHTER. – I'l s'agit là d'un titre au porteur au sens de droit. Le transporteur peut se libérer par la remise des bagages au porteur du bulletin, mais le porteur du bulletin de bagages ne peut pas exiger la livraison et le transporteur, s'il a des doutes, peut la refuser.

Le Président estime qu'il y a lieu de faire ressortir que le porteur du bulletin est envisagé comme le représentant, le mandataire du propriétaire des bagages. Il faut, en effet, répondre à la préoccupation de M. RIPERT et dire que ce bulletin n'est pas un titre au porteur.

M. PITTARD fait remarquer qu'il y a là *res inter alios acta* et qu'on peut l'empêcher. Néanmoins ce n'est pas un titre au porteur.

Après un bref échange de vues entre Sir Alfred DENNIS, M.M. WOLTERBEEK MULLER et YOUPIS, le Président constate que le Comité est d'accord sur le fond et qu'il s'agit simplement d'une question de rédaction. Il suggère la rédaction suivante : «La livraison au voyageur de ses bagages se fait valablement par leur remise au porteur du bulletin.»

Ce texte, accepté par le Rapporteur, est adopté par le Comité, étant entendu que le Sous-Comité de Rédaction pourra revoir la forme définitive à donner à cette clause.

Paragraphe 6

«Le bulletin de bagages doit contenir, en outre, une clause stipulant que le transport est soumis au régime de la responsabilité établi par la présente Convention.»

Aucune observation n'étant présentée, le paragraphe 6 est adopté.

[page 28] *Paragraphe 7*

«L'absence, l'irégularité ou la perte de ce bulletin de bagages ne préjudicie ni á l'existence, ni à la validité du contrat de transport.»

Aucune observation n'étant présentée, le paragraphe 7 est adopté.

Paragraphe 8

«Si, pour un transport international, le transporteur accepte les bagages sans qu'il ait été établi un bulletin contenant les mentions indiquées ci-dessus jusqu'à d) inclusivement, le transporteur n'en sera pas moins soumis aux règles de la présente Convention, mais le transporteur n'aura pas le droit de se prévaloir des dispositions de cette Convention qui excluent en tout ou en partie sa responsabilité directe ou dérivée des fautes de se préposés.»

Aucune observation n'étant présentée, le paragraphe 8 est adopté.

L'article 4 dans son ensemble est alors adopté.

Le Président annonce que la discussion reprendra le lendemain matin. 25 mai, à 11 heures.

La séance est levée á 19 heures.

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[page 39] [Troisième séance de CITEJA (25 mai)]

ARTICLE 18

«Si, pour un transport international, le transporteur accepte des marchandises sans qu'il ait été établi une lettre de transport aérien contenant toutes les mentions indiquées par l'article 9, *a*) à *g*) inclusivement, et par l'article 10, le contrat de transport n'en sera pas moins soumis aux règles de la présente Convention, mais le tansporteur n'aura pas le droit de se prévaloir des dispositions de cette Convention qui excluent en tout ou en partie sa responsabilité directe ou dérivée des fautes de ses préposés.»

M. MEDEIROS DO PAÇO (Brésil) se demande s'il est bien clair que les sanctions prévues à l'encontre du transporteurs s'appliqueront au cas où les documents établis seront défectueux ou si elles ne joueront que dans le cas où la lettre de transport aérien n'aura pas été établie. [page 40] D'après la rédaction de cet article, on ne voit pas clairement si la lettre de transort aérien doit être établie, sous peine, pour le transporteur, de ne pouvoir se prévaloir des clauses qui diminuent sa responsabilité ou si c'est simplement le cas de la lettre de transport aérien défectueuse. D'autant plus que l'article 5 dit dans son paragraphe 2 :

«Toutefois, l'absence, l'irégularité ou la perte de ce titre ne préjudicie ni à l'existence, ni à la validité du contrat de transport.»

Il semble que cette Convention de droit privé doit se rapprocher de la Convention de droit public du 13 octobre 1919 qui prévoit le connaissement obligatoire. Cette Convention dit, en effet, dans son article 5 que, parmi les titres, doit se trouver le connaissement obligatoire avec le manifeste. Dans cette convention de droit public, les Etats ont inscrit que ce document était obligatoire. Il serait dangereux, semble-t-il, de laisser le moindre doute à cet égard dans la convention de droit privé. D'autant plus qu'il y a un grand intérêt d'ordre pratique à rendre le connaissement obligatorie pour combattre les fraudes, pour le contrôle des articles dont l'exportation peut être défendue et pour l'évasion desquels les voies aériennes pourraient se prêter d'une manière particulière. Il y a un gros intérêt, dans le commerce international, à ce que tout transport international soit accompagné obligatoirement d'une lettre de transport aérien pour que les responsables puissent être facilement connus en cas de faute ou de transgression aux réglements, au sujet de l'exportation de marchandises défendues, et même pour le transport de certains articles pour lesquels la voie aérienne est interdite.

Dans la convention de 1919, il y a, en effet, un article qui défend le transport de certains objets par la voie aérienne.

Il serait utile qu'aucun doute ne se glisse dans les esprits et le Délégué du Brésil damande que l'assemblée soit consultée sur ce point et qu'elle dise si elle entend bien donner à la lettre de transport aérien le caractére obligatoire ou non.

Le Rapporteur répond au Délégué du Brésil sur les deux points qu'il a soulevés :

Le premier point est celui de savoir si, quand il n'y a pas de lettre de transport, pas de document, la sanction prévue par l'article 18 s'applique.

Le second point est celui de savoir s'il faut prévoir l'obligation d'avoir un document à bord.

Le Délégué du Brésil cite, à ce sujet, la convention de 1919. Mais cette convention prévoit uniquement les documents qui doivent se trouver à bord de l'avion, notamment le connaissement. Il a d'ailleurs été signalé que ce mot «connaissement» devait être remplacé ; mais il ne s'y trouve pas l'obligation de créer ce document. En ce qui concerne cette obligation, la question a été discutée à fond, lors de la première réunion, et un système intermédiarire a été adopté, systéme qui arrive à une obligation de fait à cause des sanctions de l'article 18. En effet, une transaction entre le système continental et le système britannique a été admise, car il a été estimé qu'il valait mieux ne pas imposer la lettre de transport aérien et sanctionner son absence de façon à la rendre efficace it nécessaire.

D'autre part, il est évident que du moment qu'il y a un transport, conformément à l'article 1er le régime de la convention s'applique, régime avec toutes ses conséquences, sa limitation, ses responsibilités et les sanctions prévues par la convention elle-même.

[page 41] M. MEDEIROS DO PAÇO signale que, en vertu de l'article 5 de la Convention, paragraphe 2, l'absence de la lettre de transport aérien ne préjudicie ni à l'existence, ni à la validité du contrat de transport et que, dans l'article 18, il n'est pas dit clairement que les sanctions prévues s'appliqueront en cas d'absence de lettre de transport.

M. PITTARD constate que l'articie 18 prévoit la lettre de transport irrégulière et que M. MEDEIROS DO PAÇO demande que l'on prévoie l'absence de lettre de transport. Il semble que l'accord pourrait se faire sur la rédaction suivante :

«Si, pour un transport international, le transporteur accepte des marchandises sans qu'il ait été établi une lettre de transport, ou si la lettre de transport ne contient pas toutes les mentions indiquées par l'article 9, *a*) à *g*) inclusivement, etc. . .»

Le Rapporteur acceptant ce texte, le Président consulte le Comité.

L'article 18 ainsi modifié est mis aux voix et adopté.

M BABINSKI (Pologne) signale que le Comité vient d'adopter un amendement à l'article 18 comportant deux hypothèses : celle de l'absence de lettre de transport aérien et celle de la lettre de transport incomplète. Les mêmes expressions se retrouvant dans d'autres articles, il serait bon de prier le Sous-Comité de Rédaction de veiller à cé que les mêmes expressions soient toujours employées.

La Rapporteur accepte cette suggestion. En effet, il y aura lieu de prévoir les mêmes modifications pour le bulletin de bagages et le billet de passage.

Le Président remarque, alors, que la solution toute naturelle serait d'inviter M. BABINSKI à faire partie du Sous-Comité de Rédaction.

Cette proposition est adoptée.

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[page 63] [Cinquième séance de CITEJA (26 Mai)]

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ARTICLE 3

La Rapporteur expose qu'à l'article 3 les mots «points d'arrêt prévus» ont été supprimés pour l'élégance de la phrase et il a été dit simplement «les arrêts prévus» (lettre c). La seconde modification concerne le dernier alinéa qui se lit ainsi :

«Si, pour un transport international, le transporteur accepte le voyageur sans qu'il ait été établi un billet de passage, ou si le billet ne contient pas les mentions indiquées ci-dessus, le contrat n'en pas moins soumis aux régles de la présente Convention, mais le transporteur n'aura pas le droit de se prévaloir des dispositons de cette Convention qui excluent en tout ou en partie sa responsablité directe ou dérivée des fautes de ses préposés.»

Aucune observation n'étant formulée, l'ensemble de l'article 3, mis aux voix, est adopté.

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[page 65] ARTICLE 18 (nouvel article 17)

La Rapporteur signale qu'une seule modification a été apportée à l'article 18 : « . . sans qu'il ait été établi une lettre de transport aérien ou si la lettre de transport aérien ne contient pas. . . . . ». Cet article, mis aux voix, est adopté.

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[page 99] **ANNEXE C**

RAPPORT

présenté au Comité International Technique
d'Experts Juridiques Aériens
(C.I.T.E.J.A.)
AU NOM DE LA DEUXIEME COMMISSION
par M. Henry De VOS, Rapporteur

[Page 100] **Chapitre II – Titres de transport**

*Section I. – Billet de passage (*Article 3)

La document concernant le transport des voyageurs étant différent de ceux nécessaires pour le trafic des marchandises, un article spécial a été prévu à cet effet lors de la fusion des deux matières : titre de transport et responsabilité.

Le billet de passage ne doit contenir évidemment qu'un minimum de mentions.

D'autre part, la sanction prévue pour le transport des voyageurs sans billet régulier est identique à celle préve pour le transport des bagages et celui des marchandises.

*Section II. – Bulletin de bagages (*Article 4)

La même observation que pour les passagers s'applique à leurs bagages : un article spécial a trait au bulletin de bagages.

Section III. – Lettre de transport aérien
*(*Articles 5 á 20 inclus)

L'objet de ces dispositions se trouve précisé dana lle rapport du 2 avril 1927 qui peut se résumer comme suit : tout en y ajoutant les modifications adoptées par la suite :

1) La lettre de transport aérien constate le transport international des marchandises ; elle n'est qu'un instrument de preuve.

[page 101] La Convention n'impose pas l'obligation d'une lettre de transport ; mais dés qu'elle existe, les dispositions de la Convention s'y appliquent.

Cette formule est une transaction en vue d'aboutir à une adoption unanime des règles de la Convention, certains membres étant d'avis que le transport devrait être constaté obligatoirement par une lettre de transport, les autres estimant qu'en cette matière il convient de laisser les parties libres de sauvegarder leurs intérêts.

2) Une garantie pour la protection des intérêts en cause se trouve dans le droit reconnu au transporteur de demander à l'expéditeur l'établissement et la délivrance d'une lettre de voiture et dans le droit reconu à l'expéditeur

de demander au transporteur l'acceptation d'un pareil document, cette acceptation entraînant du reste l'obligation pour le transporteur de remettre la lettre de transport signée par lui à l'expéditeur.

3) La lettre de transport est établie en trois exemplaires qui ont la même valeur et sont destinés aux trois personnes intéressées directement au transport : l'expéditeur, le transporteur et le destinataire.

4) En ce qui concerne les mentions à insérer dans la lettre de transport, celles indiquant qu'il s'agit d'un document couvrant un transport international (c'est'à-dire celles prévues sous les lettres a), a f), sont indispensables au point de ve de l'exécution de la Convention.

Il en est de même de la mention sous la lettre g) : la nature de la marchandise, parce que des prohibitions peuvent être édictées par certains pays quant à l'entrée ou à la sortie des marchandises.

Les autres mentions de h), à p), présentent une utilté incontestable, mais leur omission ne peut être, suivant certains conceptions nationales, utilement sanctionnée. Il est hautement recommandable que la lettre de transport porte ces mentions, mais leur inscription dépendra surtout de l'intérêt même qu'ont les partiers de les indiquer dans le document formant titre.

Ces mentions, de reste, ne sont pas limitatives. Il peut être utile, par exemplé, dans certains cas, de donner l'indication de l'appareil qui transporte la marchandise.

* * * * *

[page 102] 10) Quant aux sanctions, la difficulté pour certains conceptions nationales de prévoir des mesures adéquates en vue d'assurer l'observation de certaines dispositions de la Convention, a fait adopter un systéme qui apparaît comme éminemment pratique et qui consiste à sanctionner l'obligation découlant des articles 10 et 11,

par la perte éventuelle des avantages qui sont conférés aux parties par certains articles du projet de Convention sur la responsabilité du transporteur.

Les parties ont donc tout intérêt à faire usagé d'une lettre de transport contenant les mentions essentielles.

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[page 107]

AVANT-PROJET DE CONVENTION

sur la responsabilité du transporteur dans les transports internationaux par aéronefs et la lettre du transport aérien

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DEUXIÈME COMMISSION

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[page 108]

CHAPITRE II

TITRE DE TRANSPORT

Section I. – Billet de passage

ARTICLE 3

Dans le transport de voyageurs, le transporteur est tenu de délivrer un billet de passage qui doit contenir les mentions suivantes.:

a) le lieu et la date de l'émission ;

b) les points de départ et de destination ;

c) l'indication sommaire de la voie à suivre (*via*), ainsi que les points d'arrêts prévus ;

d) le nom et l'adresse du ou des transporteurs.

Le billet de passage doit contenir, en outre, une clause stipulant que le transport est soumis au régime de la responabilité établi par la présente Convention.

L'absence, l'irrégularité ou la perte de ce titre de transport ne préjudicie ni à l'existence, ni á la validité du contrat de transport.

Si, pour un transport international, le transporteur accepte le voyageur sans qu'il ait été établi un billet de passage contenant les mentions indiquées cidessus, le contrat de transport n'en sera pas moins soumis aux régles de la présente Convention, mais le transporteur n'aura pas le droit de se prévaloir des dispositions de cette Convention qui excluent en tout ou en partie sa responsabilité directe ou dérivée des fautes de ses préposés.

Section II. – Bulletin de Bagages

ARTICLE 4

Dans le transport de bagages, autres que les menus objets personnels dont le voyageur conserve la garde, le transporteur est tenu de délivrer un bulletin de bagages.

Le transporteur est déchargé de sa responsabilité par las lvraison des bagages au porteur du bulletin.

Le bulletin de bagages est établi en deux exemplaires.

Il doit contenir les mentions suivantes :

a) le lieu et la date d'émission ;

b) les points de dép art et de destination ;

c) l'indication sommaire de le voie á suivre (*via*) ainsi que les points d'arrêts prévus ;

d) le nom et l'adresse du ou des transporteurs ;

e) le numéro du billet de passage ;

f) l'indication que le bulletin est établi en deux exemplaires.

Le bulletin de bagages doit contenir une clause stipulant que le transporteur est déchargé de sa responsabilité par la livraison des bagages au porteur du bulletin.

[page 109] Le bulletin de bagages doit contenr, en outre, une cause stipulant que le transport est soumis au régime de la responsabilité établi par la prsente Convention.

L'absence, l'irrégularité ou la perte de ce bulletin de bagages ne préjudicie ni à l'existence, ni à la validité du contrat de transport.

Si, pour un transport international, le transporteur accepte les bagages sans qu'il ait été établi un bulletin contenant les mentions indiquées ci-dessus, jusqu'à *d*) inclusivement, le transporteur n'en sera pas moins soumis aux règles de la présente Convention, mais le transporteur n'aura le droit de se prévaloir des dispositions de cette Convention qui excluent en tout ou en partie sa responsabilité directe ou dérivée des fautes de ses préposés.

Section III. – Lettre de transport aérien

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[page 110] ARTICLE 9

La lettre de transport aérien contient les mentions suivantes :

a) le lieu où le document a été crée et la date à laquelle il a été établi ;

b) les points de départ et de destination ;

c) l'indication sommaire de la voie à surivre (*via*), ainsi que les points d'arrêts prévus ;

d) le nom et l'adresse de l'expéditeur '

e) le nom et l'adresse du ou des transporteurs ;

f) le nom et l'adresse du destinataire, s'il y a lieu ;

g) la nature de la marchandise et les indications nécessaires à son identification ;

h) le nombre, le mode d'emballege, les marques particuliéres ou les numéros des colis ;

i) le poids, la quantité, le volume ou les dimensions de la marchandise ;

k) le prix du transport, s'il est stipulé, la date et le lieu de paiement et la personne qui doit payer ;

l) le prix des marchandises et le montant des frais, si l'envoi est fait contre remboursement ;

m) le montant de la sommé représentant l'intérêt à la livraison déclaré conformément à l'article 25, alinéa 2 ;

n) le nombre d'exemplaires de la lettre de transport aérien ;

o) les documents transmis au transporteur pour accompagner la lettre de transport aérien ;

p) le délai de transport s'il a été stipulé.

Les mentions indiquées sous les lettres *a*) à *g*) inclusivement doivent être obligatoirement inscrites dans la lettre de transport aérien.

ARTICLE 10

La lettre de transport aérien doit contenir une clause stipulant que le transport est soumis au régime de la responsabilité établi par la présente Convention.

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ENGLISH TRANSLATION OF EXCERPTS FROM COMPLETE PROCEEDINGS OF CITEJA'S THIRD SESSION MAY 1928

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[Proceedings of CITEJA second meeting (May 24)]

CHAPTER II

Transportation Documents – Section I. – Passenger Ticket

Article 3.

Paragraph 1

For the transportation of passengers, the carrier must deliver a passenger ticket which shall contain the following particulars:

(a) the place and date of issue;

(b) the place of departure and of destination;

(c) a brief indication of a route to be followed, as well as the agreed stopping places;

(d) the name and address of the carrier or carriers;

The Rapporteur indicated that the IATA had drafted some remarks concerning Article 3:

The first remark requested the elimination from the passenger ticket of the agreed stopping places.

The Rapporteur read the arguments given by the IATA on this matter:

> "It is not advisable for the passenger ticket to contain the agreed stopping places as well. Today daily air service between two points is already available both with and without agreed stops. We cite, as an example, the regular airline Deutsche Luft Hansa,

which has daily service between Berlin and Zurich, partially with stops at Halle, Leipzig, Erfut, and Stuttgart, and partially without stops. Other airline companies should endeavor to organize in the same way, with both direct flights and flights with stops. Although the passenger ticket generally indicates a specific hour, it often happens that changes are made. Considering that several [air] stations are overcrowded with traffic, it cannot be guaranteed that in the event of such changes the stops, as indicated on the flight plan, will not be added to or eliminated.

Under the terms of Article 1, the passenger ticket is required to contain only those stopping places indicated on the flight plan that are located in a country not containing both the place of departure and the place of destination. Consequently, if the agreed stopping place must now be listed on the passenger ticket, this will affect only the last stopping places.

In setting forth this proposal, we should like to draw attention to the fact that airline companies do not have in their respective stations as large a contingent of personnel as do, for instance, the railroads or maritime shipping companies. For that reason, available personnel should not be encumbered with any paperwork that is not absolutely essential. That is especially important if the faulty issuance of a passenger ticket could result in some harm to the airline.

The IATA set forth a second proposal: the addition of the baggage check number to the passenger ticket.

The first of these proposals—the elimination of letter (c)—had been studied previously by the experts, who had discussed and rejected it; therefore the Rapporteur did not accept it. The second proposal was a practical matter and

could be of interest: since Article 4 provides for the number of the passenger ticket, it would be possible to stipulate that the number of the baggage check be entered on the passenger ticket. From the standpoint of the Convention, however, this proposal has no legal bearing; it is useful only for the carrier, who would include this particular in the ticket whether this were stated in the Convention or not.

The Chairman asked the Committee if it wished to accept this suggestion, which did not seem to have a place in the text of the Convention.

Inasmuch as there were no other comments concerning the first paragraph, and the IATA suggestion was not accepted, the first paragraph of Article 3 was put to a vote and adopted.

Paragraph 2

The passenger ticket must also contain a statement that the transportation is subject to the rules relating to liability established by this Convention.

Mr. Pittard remarked that it was understood that sample tickets would be annexed to the Convention, as had been done for the Bern Convention on railroads. He stated that these samples should contain the minimum amount of information, since the airlines were free to add any additional data they might consider useful.

The Rapporteur indicated that this matter was officially covered in Article 19.

Paragraph 2 was therefore put to a vote and adopted.

Paragraph 3

The absence, irregularity, or loss of this transportation document shall not affect the existence or the validity of the contract of transportation.

Inasmuch as there were no comments, paragraph 3 was adopted.

Paragraph 4

If, for international transportation, the carrier accepts a passenger without a passenger ticket containing the particulars indicated above having been made out, the contract of transportation shall still be subject to the rules of this Convention, but the carrier shall not be entitled to avail himself of those provisions of this Convention which exclude fully or partially his direct liability or that deriving from the negligence of his agents.

Mr. Youpis indicated that the penalty provided for in this paragraph was too severe for the case of a simple omission. The actual words were, ". . . without a passenger ticket containing the particulars indicated above having been made out . . .". The omission of the place of issuance or of the date, for example, would divest the carrier of the right to avail himself of those provisions releasing him from liability. He requested that the following sentence be added at the end of paragraph 4: "If this passenger ticket does not contain one of the particulars indicated above, the carrier shall forfeit this right only if no harm was caused to the passengers."

Mr. Pittard considered that the Convention must contain its own defense. This issue was afforded in-depth study. If one of the particulars required is omitted, that is a professional error, and it should carry a penalty.

The Rapporteur added that as Mr. Pittard had just indicated, long discussions, held earlier, had resulted in the text currently proposed; the only practical penalty found was that deriving from the Convention itself. Those omissions Mr. Youpis considered minor were not minor at all, since everything indicated as a compulsory particular was

extremely important. He recalled what Mr. Cogliolo had said previously on this subject:

"A public transportation service should always have its papers in order, and one should always be harder on it than on a simple lapse of memory on the part of a passenger."

Mr. Youpis still considered that the current text was too severe and could be attenuated in the way he had indicated in those cases where no one had been wronged.

The Rapporteur adhered to the text of the Commission. He noted that this provision, which had frequently been attacked in the course of previous discussions, was always retained for the following reason: it was an essential provision of the Convention. Indeed, this text constituted a compromise among the various opinions of the government delegations to the CITEJA: some delegates had requested that the document be made compulsory; others called for a civil penalty, and still others, a criminal penalty. The text finally adopted was based on the British view. It represented a compromise accepted by all members of the Commission. If this text failed, it was to be feared that the entire Convention would have to be called into question.

Mr. Youpis adhered to his amendment, to which he gave the following final form: "If the passenger ticket does not contain any one of the particulars indicated above, the carrier shall forfeit this right only if no harm was caused to the passengers."

The amendment, put to a vote, was not adopted.

The Chairman put paragraph 4, as currently written, to a vote; paragraph 4 was adopted.

Article 3 was therefore adopted in its entirety.

Section II. – Baggage Check

Article 4

Paragraph 1

For the transportation of baggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a baggage check.

Inasmuch as there were no comments, paragraph 1 was put to a vote and adopted.

Paragraph 2

The carrier is released from liability upon delivery of the baggage to the bearer of the check.

Mr. Ripert commented that this text seemed to be saying that no claim is possible after the delivery of the baggage. He felt that what it had intended to say was simply that the carrier is released from liability when he has handed the baggage over to the bearer of the check, and that the question of liability for the baggage itself had not been settled, which it should be, as in the case of goods.

The Chairman felt that under the circumstances, this was the person qualified to take delivery of the baggage. He therefore proposed that the text be worded as follows: "The delivery to the traveler of his baggage shall be considered to have been validly made upon its surrender to the bearer of the check."

This wording, put to a vote, was adopted.

Paragraph 3

The baggage check shall be made out in duplicate.

Mr. Wolterbeek Muller (Netherlands) felt that it was not useful to state in the Convention that the baggage check shall be made out in duplicate. The carrier will do so if he wishes, but there must be just one copy required: the copy for the traveler.

Mr. Ripert answered that the same reasoning had been used for the air waybill: the carrier's document accompanies the goods or the baggage, so it is useful for him to have one copy remaining.

Mr. Richter added that if the traveler were to lose his baggage check, he could request that the other copy be produced and use that second copy as his proof.

Aided by these explanations, the Chairman put paragraph 3 to a vote, and it was adopted.

Paragraph 4

* * * * *

It should contain the following particulars:

(a) the place and date of issue;

(b) the place of departure and destination;

(c) a brief indication of the route to be followed and the agreed stopping places;

(d) the name and address of the carrier or carriers;

(e) the number of the passenger ticket;

(f) the statement that the baggage check is made out in duplicate.

Mr. Pittard pointed out that whereas a few moments ago there had been a request that the baggage check number be entered on the passenger ticket, the Commission considered it preferable to enter the passenger ticket on the baggage check.

No other comment was made, and paragraph 4 was adopted.

Paragraph 5

The baggage check must contain a statement that the carrier is released from liability upon delivery of the baggage to the bearer of the check.

Mr. Ripert noted that the wording of this paragraph seemed to indicate that the baggage check was tantamount to a bearer bond, giving the transportation company the right to deliver the baggage to the bearer of the check, without any provision being made for the possibility that the traveler would object to the delivery of his baggage to the bearer. Anyone holding the baggage check, regardless of the way in which he had obtained this check, could collect the baggage. In this way, the Committee was establishing a sort of bearer bond, which was not what it had intended.

Mr. Richter: This is a bearer bond in the legal sense. The carrier may be released from liability upon the surrender of the baggage to the bearer of the check, but the bearer of the baggage check may not demand delivery, and the carrier, should he have some doubt, may refuse delivery.

The Chairman considered that it should be made clear that the bearer of the check was considered the representative or agent of the owner of the baggage. He felt that Mr. Ripert's concern should therefore be addressed and that there should be an indication that this check was not equivalent to a bearer bond.

Mr. Pittard noted that this was a matter of *res inter alios acta,* and that it could be prevented. It was not, however, a bearer bond.

After a brief exchange of views between Sir Alfred Dennis, Mr. Wolterbeek Muller, and Mr. Youpis, the Chairman noted that the Committee concurred on substance and that it was simply a matter of wording. He suggested the following wording: "The delivery to the traveler of his baggage shall be considered to have been validly made upon its surrender to the bearer of the check."

This text, accepted by the Rapporteur, was adopted by the Committee, with the understanding that the Drafting

Subcommittee would review the final form to be given this statement.

Paragraph 6

The baggage check must also contain a statement that the transportation is subject to the rules relating to liability established by this Convention.

Inasmuch as there were no comments, paragraph 6 was adopted.

Paragraph 7

The absence, irregularity, or loss of this baggage check shall not affect the existence or the validity of the contract of transportation.

Inasmuch as there were no comments, paragraph 7 was adopted.

Paragraph 8

If, for international transportation, the carrier accepts baggage without a check containing the particulars indicated above, up to and including (d), having been made out, the carrier shall still be subject to the rules of this Convention, but the carrier shall not be entitled to avail himself of those provisions of this Convention which exclude fully or partially his direct liability or that deriving from the errors of his employees.

Inasmuch as there were no comments, paragraph 8 was adopted.

Article 4 was therefore adopted in its entirety.

The Chairman announced that the discussion would continue on the following morning, May 25, at 11:00 a.m.

The meeting was adjourned at 7:00 p.m.

* * * * *

[Third CITEJA meeting (May 25)]

Article 18

"If, for international transportation, the carrier accepts goods without an air waybill having been made out containing all the particulars set out in Article 9 (a) to (g) inclusive, and in Article 10, the contract of transportation shall still be subject to the rules of this convention, but the carrier shall not be entitled to avail himself of the provisions of this convention which totally or partially exclude his direct liability or liability derived from the negligence of his agents."

Mr. Medeiros do Paco (Brazil) asked whether it was clear that the penalties provided against the carrier will be applied if the documents made out are defective or if they will apply only when the air waybill has not been made out.

As this article is worded, it is unclear whether the air waybill must be made out, subject to penalty for the carrier of being unable to avail himself of the clauses that reduce his liability, or whether that is simply the case for the defective air waybill. Moreover, Article 5(a) states:

"Nonetheless, the absence, irregularity, or loss of this document shall not prejudice the existence or the validity of the contract of transportation."

It seems that this private-law convention should become more like the public-law convention of October 13, 1919, which provides, in Article 5, for a mandatory bill of lading with the manifest, among other documents. In this public-law convention, the States indicated that this document was mandatory. It seems dangerous to leave the slightest doubt in this respect in the private-law convention, particularly since there is great interest in practical terms in

making the bill of lading mandatory in order to combat fraud, to control articles whose exportation may be prohibited, and to control evasion, to which the airways particularly seem to lend themselves. There is great interest in international trade in having all international transportation accompanied mandatorily by an air waybill so that the persons responsible can be easily identified in case of negligence or transgression of the rules on the exportation of prohibited goods and even for the transportation of certain articles for which air transportation is prohibited.

In the 1919 convention there is an article that prohibits air transportation of certain items.

Thus there should be no room for doubt, and the Brazilian delegate requests that the assembly be consulted on this point and state whether or not it intends to make the air waybill mandatory.

The Rapporteur responded to the two points raised by the Brazilian delegate.

The first point was to determine whether the penalty provided in Article 18 applied when there was no waybill or document.

The second point was to determine whether it should be made obligatory to have a document on board.

The Brazilian delegate cited the 1919 convention on this subject. But this convention solely provides for documents which should be on board the aircraft, notably the bill of lading. It has also been noted that the word "*connaissement*" [bill of lading] should be replaced, but there seems to be no obligation to create this document. Insofar as this obligation is concerned, the issue was discussed in depth during the initial meeting, and an intermediary system was adopted, a system that amounts to a *de facto* obligation because of the penalties in Article 18. Indeed, a compromise between the continental system and the British

system was allowed, for it was thought better not to impose the air waybill and to penalize its absence so as to make it effective and necessary.

Moreover, it is evident that, once a transportation occurs, in conformity with Article 1 the regime of the convention applies, a regime with all its consequences, limitation, liabilities, and the penalties provided by the convention itself.

Mr. Medeiros do Paco noted that, under Article 5(2) of the convention, the absence of the air waybill does not affect the existence or the validity of the contract of transportation and that in Article 18 it is not clearly stated that the penalties stipulated will apply in the absence of the waybill.

Mr. Pittard noted that Article 18 provides for the irregular waybill and that Mr. Medeiros do Paco is requesting that provision be made for the absence of the waybill. It seems that agreement could be reached on the following wording:

"If, for international transportation, the carrier accepts goods without a waybill having been made out, or if the waybill does not contain all the particulars set out in Article 9 (a) to (g) inclusive, etc. . . ."

Since the Rapporteur accepted this text, the Chairman consulted the Committee.

Article 18 thus amended was put to a vote and adopted.

Mr. Babinski (Poland) noted that the Committee had just adopted an amendment to Article 18 involving two assumptions: the absence of the air waybill and an incomplete waybill. Since the same expressions are used in other articles, it would be advisable to request the Drafting Subcommittee to ensure that these same expressions are always used.

The Rapporteur accepted this suggestion. It would be advisable to ensure that the same changes are made for the baggage check and the passenger ticket.

The Chairman remarked then, that the obvious solution would be to invite Mr. Babinski to join the Drafting Subcommittee.

This proposal was adopted.

* * * * *

[Fifth CITEJA meeting (May 26)]

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Article 3

The Rapporteur stated that in Article 3 the words "*points d'arrêt prévus*" [agreed stopping places] were eliminated for stylistic reasons and "*les arrêts prévus*" was simply used (letter c). The second change concerned the final paragraph, which reads as follows:

"If, for international transportation, the carrier accepts a passenger without a passenger ticket having been made out, or if the ticket does not contain the above-mentioned particulars, the contract is still subject to the rules of this Convention, but the carrier shall not be entitled to avail himself of those provisions of this convention which totally or partially exclude his direct liability or liability derived from the negligence of his agents."

Since no observations were made, all of Article 3 was put to a vote and adopted.

* * * * *

Article 18 (new Article 17)

The Rapporteur noted that only one change was made to Article 18: "without an air waybill having been made

out, or if the air waybill does not contain . . ." This article was put to a vote and adopted.

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Annex C

Report Submitted on Behalf of the Second Commission
by Henry de Vos, Rapporteur
to the
International Technical Committee of
Aerial Legal Experts

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Chapter II.—Transportation Documents

Section I.—Passenger Ticket (Article 3)

Since the document involving the transportation of passengers is different from those needed for transporting goods, a special article was anticipated for such purpose when the two subjects were merged, i.e., transportation document and liability.

Naturally, the particulars on the passenger ticket must be kept to a minimum.

In addition, the sanction for transporting passengers without regular tickets is the same as that for the transportation of baggage and of goods.

Section II.—Baggage Check (Article 4)

The remark concerning passengers applies to their baggage as well: a special article covers the baggage check.

Section III—Air Waybill (Articles 5 through 20)

The purpose of these provisions was clarified in the

report dated April 2, 1927, summarized as follows with such changes as were adopted subsequently:

(1) The air waybill certifies the international transportation of goods; it is a document of proof only.

The Convention does not make the air waybill mandatory, but when such document exists, the provisions of the Convention apply thereto.

This procedure is a mechanism to achieve unanimous adoption of the rules of the Convention, since some participants feel that an air waybill should be required to certify transportation, while others believe that the parties should be free to protect their own interests in this regard.

(2) The protection of such interests is guaranteed by the right of the carrier to request the consignor make out and hand over to him a waybill and the right of the consignor to request the carrier to accept a like document, such acceptance implying the obligation by the carrier to hand over its signed air waybill to the consignor.

(3) The air waybill is drawn up in three copies of equal value for the three parties directly involved in the transportation: the consignor; the carrier; and the consignee.

(4) Regarding the information to be included in the air waybill, those particulars indicating that the document covers international transportation, i.e., (a) through (f), are essential from the standpoint of the Convention's enforcement.

The same applies to the particular under (g), the nature of the goods, because some countries may prohibit the entry or exit of certain goods.

The other particulars under (h) through (p) are of undisputed usefulness, yet failure to include them cannot, in the view of certain nations, be advantageously penalized. It is highly recommended that the air waybill include such

particulars, but their inclusion will depend primarily on the parties' own interest in mentioning them in the document.

Such particulars are not, in any case, restrictive; in some cases it may be useful to specify, for example, the aircraft transporting the goods.

* * * * *

(10) With respect to penalties, the difficulty for some nations in providing adequate measures to ensure the enforcement of certain provisions of the Convention resulted in the adoption of an eminently practical system of enforcing the obligation arising under Articles 10 and 11 by possible loss of the advantages to the parties under certain articles of the draft Convention on the liability of the carrier.

It is therefore in the best interests of the parties to use an air waybill containing the essential particulars.

* * * * *

PRELIMINARY DRAFT OF THE CONVENTION

relating to documents of air carriage and the liability of the carrier in international carriage by aircraft

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SECOND COMMISSION

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CHAPTER II

Transportation Documents

Section I. – Passenger Ticket

For the transportation of passengers, the carrier must

deliver a passenger ticket which shall contain the following particulars:

a) the place and date of issue;

b) the place of departure and of destination;

c) a brief indication of a route to be followed, as well as the agreed stopping places;

d) the name and address of the carrier or carriers;

The passenger ticket must also contain a statement that the transportation is subject to the rules relating to liability established by this Convention.

The absence, irregularity, or loss of this transportation document shall not affect the existence or the validity of the contract of transportation.

If, for international transportation, the carrier accepts a passenger without a ticket containing the particulars having been made out, the contract of transportation shall still be subject to the rules of this Convention, but the carrier shall not be entitled to avail himself of those provisions of this Convention which exclude fully or partially his direct liability or that deriving from the negligence of his agents.

Section II – Baggage Checks

ARTICLE 4

For the transportation of baggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a baggage check.

The carrier is released from liability upon delivery of the baggage to the bearer of the check.

The baggage check shall be made out in duplicate.

It should contain the following particulars:

a) the place and date of issue;

b) the place of departure and destination;

c) a brief indication of the route to be followed and the agreed stopping places;

d) the name and address of the carrier or carriers;

e) the number of the passenger ticket;

f) the statement that the baggage check is made out in duplicate;

The baggage check must contain a statement that the carrier is released from liability upon delivery of the baggage to the bearer of the check.

The baggage check must also contain a statement that the transportation is subject to the rules relating to liability established by this Convention.

The absence, irregularity, or loss of this baggage check shall not affect the existence or the validity of the contract of transportation.

If, for international transportation, the carrier accepts baggage without a check containing the particulars indicated above, up to and including d), having been made out, the carrier shall still be subject to the rules of this Convention, but the carrier shall not be entitled to avail himself of those provisions of this Convention which exclude fully or partially his direct liability or that deriving from the errors of his employees.

Section III—Air Waybill

The air waybill shall contain the following particulars:

a) the place and date of its execution;

b) the place of departure and of destination;

c) the itinerary to be followed, the stopover points for transshipment;

d) the name and address of the consignor;

e) the name and address of the carrier or carriers;

f) the name and address of the consignee, if the case so requires;

g) the nature of the goods and characteristics necessary for its identification;

h) the number of packages, the method of packing, and the particular marks or numbers upon them;

i) the weight, quantity, capacity, or dimensions of the goods;

k) [sic] the freight, if it has been agreed upon, the date and place of payment, and the person who is to pay for it;

l) the price of the goods and the amount of the expenses incurred, if the goods are sent for payment on delivery;

m) the amount of the value declared in accordance with article 25, line 2;

n) the number of parts of the air waybill;

o) the documents handed to the carrier to accompany the air waybill;

p) the time fixed for the transportation, if it is agreed upon.

The particulars indicated under letters a) through g) must be contained in the air waybill.

ARTICLE 10

The air waybill shall contain a statement that the transportation is subject to the rules relating to liability established by this Convention.

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APPENDIX F

COMITÉ INTERNATIONAL TECHNIQUE D'EXPERTS JURIDIQUES AÉRIENS (C.I. T. E. J.A.)

[Octobre 1928]

AVANT-PROJET DE CONVENTION RELATIVE AUX DOCUMENTS DE TRANSPORT AÉRIEN ET A LA RESPONSABILITÉ DU TRANSPORTEUR DAN LES TRANSPORTS INTERNATIONAUX PAR AÉRONEFS

I. – Rapport au nom du Comité International Technique d'Experts Juridiques Aériens, par M. Henry DE Vos, Rapporteur, sur l'Avant-Projet de Convention relative aux documents de transport aérien et à la responsabilité du transporteur dans les transports internationaux par aéronefs.

II. – Avant-Projet de Convention adopté par le C. I. T. E. J. A. au cours de sa Troisième Session (Mai 1928).

III. – Annexe (Documents de transport visés à l'article 19 de l'Avant-Projet de Convention).

[page 3] I

RAPPORT

présenté au nom du Comité International Technique d'Experts Juridiques Aériens

par M. Henry DE VOS, Rapporteur

su l'Avant-Projet de Convention relative aux documents de transport aérien et à la responsabilité du transporteur dans les transports internationaux par aéronefs

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Le Comité International Technique d'Experts Juridiques Aériens, au cours de sa réunion de Madrid en mai 1928, a définitivement mis au point l'Avant-Projet de Convention ci-annexé ayant pour objet : *certaines règles relatives aux documents de transport aérien* : billet de passage, bulletin de bagages, et lettre de transport aérien, *ainsi qu'à la responsabilité du transporteur aérien* et à la limitation de cette responsabilité.

Ce projet est l'aboutissement de nombreuses études de préparation qui ont trouvé leur expression dans huit textes antérieurs concernant soit la responsabilité du transporteur, soit la lettre de transport.

Un premier avant-projet de Convention fixant les bases de la responsabilité du transporteur et de la limitation de cette responsabilité en matière de transports aériens, avait été présenté par le Gouvernement français à une Conférence internationale qui se tint à Paris le 26 octobre 1925.

Cette Conférence institua une Commission qui remania ce texte. La Conférence fut saisie le 3 novembre 1925 de l'Avant-Projet ainsi amendé. Elle y apporta de nouvelles modifications le 6 novembre 1925.

D'autre part, un premier Avant-Projet sur la lettre de transport fut présenté à la Deuxième Commission du C. I. T. E. J. A. (créé entre temps) qui se réunit à Paris le 30 mars 1927.

A la suite de l'examen de ce projet par le C. I. T. E. J. A. en avril 1927, ce texte fut légèrement amendé.

Le C. I. T. E. J. A. ayant au cours de cette même réunion décidé d'examiner la possibilité de fusionner en une Convention unique les deux matières — responsabilité et documents de transport — un nouvel avant-projet fut présenté en juin 1927.

Ce texte fut modifié à la suite des délibérations de la Deuxième Commission du C. I. T. E. J. A. réunie à Bruxelles du 7 au 10 novembre 1927.

Une nouvelle réunion de cette Commission eut lieu à Paris les 21 et 22 mars 1928 au cours de laquelle les textes antérieurs furent amendés.

Enfin, ceux-ci revinrent devant le C. I. T. E. J. A. qui les mit définitivement au point à Madrid en mai 1928.

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CHAPITRE II

TITRES DE TRANSPORT

Section I. – Billet de passage

Un document spécial est prévu pour le transport des voyageurs. Ce document est nécessairement différent de ceux utilisés pour le transport des bagages et le trafic des marchandises.

Ce billet de passage ne doit contenir qu'un minimum de mentions.

D'autre part, la sanction prévue pour le transport des voyageurs sans billet ou avec un billet non conforme à la Convention est identique à celle prévue pour le transport des bagages et celui des marchandises.

Cette formule de sanction constitue une transaction entre les différentes opinions des Délégations des Gouvernements au C.I.T.E.J.A., dont les unes demandaient que le document de transport fut obligatoire, certaines avec sanction civile et d'autres avec sanction pénale, et dont les autres défendaient le principe de la liberté.

Section II. – Bulletin de bagages

La même observation que pour les passagers s'applique à leurs bagages. Un article spécial a trait au bulletin de bagages.

Il est prévu que le transporteur peut valablement remettre les bagages au porteur du bulletin. Mais ce bulletin ne constitue pas un titre au porteur ; le transporteur peut, s'il a des doutes au sujet de leur propriété, refuser la délivraison, sans preuve, des bagages. Le voyageur peut, d'autre part, demander, en cas de perte de son bulletin, la production du second exemplaire afin de rapporter la preuve qu'il est le propriétaire. Enfin, la responsabilité du transporteur pour les bagages est une responsabilité de droit commun et la preuve de la faute incombe au propriétaire de bagage.

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III

ANNEXE

(Documents de transport visés à l'article 19 de l'Avant-Projet de Convention)

MODÈLE I

BULLETIN INTERNATIONAL DE PASSAGE

RECTO

N°	N°	N°
Transporteur	*Transporteur*	*Transporteur*
Adresse	*Adresse*	*Adresse*
Points de départ :	Points de départ :	Points de départ :
et de destination :	et de destination :	et de destination :
via	*via*	*via*
Arrêts prévus	Arrêts prévus	Arrêts prévus
		CONDITIONS DE TRANSPORT AU DOS
Date	Date	Billet délivré à le
Service	Service	pour le voyage
Prix	Prix	Prix

VERSO

Le présent bulletin de passage est soumis au régime de la responsabilité établi par la Convention internationale du

DISPOSITIONS PRINCIPALES

MODÈLE II

BULLETIN INTERNATIONAL DE BAGAGES

103a

RECTO

N°_____ du billet de passage.

Transporteur _____

Adresse _____

Points de départ _____

et de destination _____

via _____

Arrêts prévus _____

NOMBRE	POIDS	VOLUME ET DIMENSIONS	VALEUR DU BAGAGE
			Pour l'assurance Pour la douane

Date : _____

N°_____ du billet de passage.

Transporteur _____

Adresse _____

Points de départ _____

et de destination _____

via _____

Arrêts prévus _____

NOMBRE	POIDS	VOLUME ET DIMENSIONS	VALEUR DU BAGAGE
			Pour l'assurance Pour la douane

Fait en double à _____ *le* _____

La livraison des bagages au voyageur se fait valablement au porteur du bulletin.

VERSO

Le présent bulletin de bagages est soumis au régime de la responsabilité établi par la Convention internationale du _____

DISPOSITIONS PRINCIPALES

MODÈLE III

LETTRE INTERNATIONALE DE TRANSPORT AÉRIEN

RECTO

Destinataire _____ Adresse _____

Lieu de destination _____

Itinéraire _____

NATURE DE LA MARCHANDISE ET INDICATIONS POUR IDENTIFICATION	NOMBRE	MARQUES NUMÉROS	MODE D'EMBALLAGE	POIDS VOLUME DIMENSIONS	QUANTITÉ CONTENANCE	ÉTAT CONDITIONNEMENT	VALEUR DE LA MARCHANDISE
							Pour l'assurance
							Pour la douane

Intérêt à la livraison _____

(montant en toutes lettres)

Transport payé (ou dû).
Frais et droits de douane dus par le destinataire (ou à réclamer à l'expéditeur).
Frais de réexpédition dus par le destinataire (ou à réclamer à l'expéditeur).

DOCUMENTS JOINTS : _____

Instructions ou informations de l'expéditeur (en cas de refus du colis, etc.) :

PAYÉ PAR L'EXPÉDITEUR	FRAIS	DU PAR LE DESTINATAIRE — VALEUR MONÉTAIRE DES PAYS TRANSITAIRES	DU PAR LE DESTINATAIRE — MONNAIE DU PAYS DE DESTINATION
	Transport _____ par kilogr.		
	Assurance		
	Droits de douane, dédouanement.		
	Frais de manipulation, remise à domicile		
	_____		
	TOTAL. . . .		

La signature de cette lettre de voiture entraîne l'acceptation des conditions inscrites au dos de cette feuille.

L'EXPÉDITEUR : Nom et adresse _____

Signature : _____

Fait en _____ exemplaires, à _____, le _____

POUR L'EXPÉDITEUR :
(ou pour le Transporteur)

Expédié par avion : _____
Date : _____
Aérodrome de départ : _____
Transporteur : _____
(nom et adresse) : _____
Signature : _____

La partie encadrée à remplir par le Transporteur.

VERSO

La présente lettre de transport est soumise au régime de la responsabilité établi par la Convention internationale du _____

DISPOSITIONS PRINCIPALES

[English Translation]

INTERNATIONAL TECHNICAL COMMITTEE
OF
AERIAL LEGAL EXPERTS
(C.I.T.E.J.A.)

[October 1928]

TENTATIVE DRAFT OF CONVENTION

REGARDING AERIAL TRANSPORTATION DOCUMENTS AND THE RESPONSIBILITY OF THE CARRIER IN INTERNATIONAL TRANSPORTATION BY AIRCRAFT.

I. Report in the name of the International Technical Committee of Aerial Legal Experts by Mr. Henry de Vos, Reporter, on the Tentative Draft of Convention regarding aerial transportation documents and the responsibility of the carrier in international transportation by aircraft.

II. Tentative Draft of Convention adopted by the C.I.T.E.J.A. during its Third Meeting (May, 1928)

III. Annex (Transportation Documents mentioned in Article 19 of the Tentative Draft of Convention).

I

REPORT

presented in the name of the International Technical Committee of Aerial Legal Experts

by Mr. Henry de Vos, Reporter,

on the Tentative Draft of Convention relating to aerial transportation documents and to the responsibility of the carrier in international transportation by aircraft.

The International Technical Committee of Aerial Legal Experts, during its meeting at Madrid in May, 1928, definitely decided on the Tentative Draft of Convention hereto annexed, having as its aim: certain rules relating to aerial transportation documents: passage ticket, baggage check, and aerial waybill, and also to the responsibility of the aerial carrier and to the limitation of that responsibility.

This draft is the result of numerous preparatory studies which found expression in eight previous texts regarding either the responsibility of the carrier or the transportation document.

An original tentative draft of Convention fixing the bases for the responsibility of the carrier and the limitation of that responsibility was presented by the French Government at an International Conference held at Paris on October 26, 1925.

That Conference formed a Commission which revised the text. The Conference was informed of the Tentative Draft as thus amended on November 3, 1925. New changes were made in it on November 6, 1925.

Further, a first Tentative Draft on the waybill was presented to the Second Commission of the C.I.T.E.J.A. (which had been created meanwhile) which met at Paris on March 30, 1927.

This text was slightly modified after an examination of this draft by the C.I.T.E.J.A. in April, 1927.

The C.I.T.E.J.A., during this same meeting, having decided to examine the possibility of uniting the two subjects—responsibility and transportation documents—a new tentative draft was presented in June, 1927.

This text was altered after the deliberations of the Second Commission of the C.I.T.E.J.A. meeting at Brussels from November 7 to 10, 1927.

Another meeting of this Commission took place at Paris on March 21 and 22, 1928, during which the former texts were amended.

Finally, they were brought before the C.I.T.E.J.A. again, which put them into definite form at Madrid in May, 1928.

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CHAPTER II
TRANSPORTATION DOCUMENTS

Section I—Passage Ticket.

A special document is provided for the transportation of travelers. This document is necessarily different from those used for the transportation of baggage and the carrying of merchandise.

This passage ticket should contain a minimum of notation.

Further, the sanction given for the transportation of passengers without a ticket or with a ticket which does not conform to the Convention is the same as that given for the transportation of baggage and that of merchandise.

This formula of sanction constitutes a compromise of the various opinions of the Governmental Delegations to the C.I.T.E.J.A. some of whom asked that the transportation document be compulsory, certain ones with civil sanction and others with a penal clause, and others of whom defended the principle of freedom.

Section II. – Baggage Check.

The observation made requiring passengers applies likewise to their baggage. A special article is concerned with the baggage check.

It is provided that the carrier may validly return the baggage to the holder of the check. But this check does not constitute a title to the bearer; the carrier may, if he is in doubt as to their ownership, refuse to deliver the baggage without proof. On the other hand, the traveler may, in case of loss of his check, request the delivery of a second check, in order to have proof that he is the owner. Finally, the responsibility of the carrier for the baggage is a common-law responsibility and proof of fault devolves on the owner of the baggage.

* * * * *

APPENDIX G

EXCERPTS FROM REPORT OF THE PREPARATORY COMMITTEE TO THE WARSAW CONFERENCE ON PROPOSED AMENDMENTS SUBMITTED TO THE CONFERENCE (IN FRENCH)

COMMISSION PREPARATOIRE

ANALYSE DES AMENDMENTS.

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ARTICLE 3

1er alinea –

Proposition polonaise – Question de *fond* (2).

Lettre c) – Propositions allemande, britannique et hongroise – Question de *fond* (2).

Lettre d) – Proposition italienne – Question de *rédaction* – Propositions allemande et britannique – Question de *fond* (2).

Lettre e) additionnelle – Propositions allemande et tchécoslovaque (prix de transport) – Question de *fond* (2).

Lettre f) additionnelle – Propositions polonaise et brésilienne (mentions du voyageur) – Questioin de *fond* (2).

4ème alinéa –

Proposition japonaise en rapport avec le dernier alinéa de l'article 4 – Il y aura lieu de reprendre la même formule générale de rédaction.

Proposition hellénique (sanctions) – Question de *fond* (2).

Proposition allemande – Question de *rédaction*.

ARTICLE 4

4ème alinéa –

Lettre a) – Proposition britannique (suppression) – Question de *fond* (2).

Lettre c) – Proposition britannique, allemande et hongroise (suppression) – Question de *fond* (2).

Lettre d) – Propositon italienne – Question de *rédaction*. Propositon allemande (suppression) – Question de *fond* (2).

Lettre f) – Proposition britannique (suppression) – Question de *fond* (2).

Lettre h) additionnelle – Propositions suisse et allemande (adjonction du nombre des colis, etc. . .) – Question de *fond* (2).

Lettre i) additionnelle – Proposition allemande (inteérêt à la libraison) – Question de *fond* (2).

Lettre l) additionnelle – Proposition allemande et tchécoslovaque (prix du transport) – Question de *fond* (2).

5ème alinéa –

Proposition allemande – Question de *rédaction*.

dernier alinéa –

Proposition japonaise (voir article 3, dernier alinéa).

Deuxième proposition japonaise (mentions obligatoires) – Question de *fond* (2).

Proposition suisse (nouvelles mentions obligatoires) – Question de *fond* (2).

Proposition hellénique (voir article 3) – Question de *fond* (2).

EXCERPTS FROM PROPOSED AMENDMENT OF GREEK DELEGATION SUBMITTED TO THE WARSAW CONFERENCE (IN FRENCH)

PROPOSITION DE LA DELEGATON HELLENIQUE

ARTICLE 3 – paragraphe 4 –

Conformément à l'article 22 du projet, dans le cas d'un accident, le transporteur peut dégager sa responsabilité s'il prouve que lui et ses préposés, ont pris les mesures raisonnables pour éviter le dommage, ou qu'il leur était impossible de les prendre.

Toutefois, d'après l'article 3, le transporteur perd cet avantage, si le billet de passage ne contient pas les mentions indiquées dans cet article.

Il se peut, en effet, que par une simple négligence le transporteur ait omis de mentionner dans le billet de passage le lieu de l'émission, ou le point de départ, ou son nom et son adresse; ou même qu'ill conserve dans le billet son ancienne adresse, ou enfin qu'il ne signale pas un arrêt intermédiaire.

Ce sont là, en général, des omissions sans grande importance pour la partie, parce que il est connu ou facile á établir que le billet a été émis et le dêpart a eu lieu de l'aérodrome de telle ville, que l'avion appartient à telle compagnie, ou parce que l'arrêt intermédiaire peut être sans intérêt pour le contractant.

On peut se demander pourquoit une telle omission, sans importance pour la plupart des cas, devrait entraï, dans tous les cas, une sanction aussi grave que celle prévue par l'article 3 paragraphe 4.

Si l'omission est sans intérêt pour l'autre partie et si elle ne lui cause aucun dommage, comment pourrait-on justifier cette sanction sévère à la charge due transporteur?

Cette sanction est justifiée seulement dans le cas où l'omission d'une mention aurait engendré un dommage au passager, comme il peut arriver dans certaines circonstances.

Mais qui jugera s'il y a dommage à cause de cette omission à l'autre contractant, et si ce dommage est tel qu'il faut faire perdre au transporteur la facilité de se dégager par la preuve qu'il a fait le nécessaire pour éviter l'accident? Il n'y a certes que le tribunal, saisi de l'affaire, qui pourra faire cette appréciation.

C'est pour ces raisons que nous proposons de modifier l'alinéa 4 de l'article 3 du projet comme suit :

"Si, pour un transport international, le transporteur accepte le voyageur sans qu'il ait étali un billet de passage, le contrat de transport n'en sera pas moins soumis aux règles de la présente convention, mais le transporteur n'aura pas le droit de se prévaloir des dispositions de cetter Convention qui excluent en tout ou en partie sa responsabilité directe ou dérivée des fautes de ses préposés.

"*Si le billet de passage ne contient passage pas une des mentions in diquées ci-dessus, le transporteur sera privé de ce droit dans le cas, oú, d'apprès l'appréciation du tribunal, un dommàge serait causé de ce fait à l'autre partie.*"

Pour les mêmes raisons il faudrait modifier dans le même sens l'alinéa 7 de l'article 4 pour le bulletin de bagages et l'article 17 pour la lettre du transport.

EXCERPTS FROM PROPOSED AMENDMENTS OF JAPANESE DELEGATION SUBMITTED TO THE WARSAW CONFERENCE (IN FRENCH)

OBSERVATIONS

PRESENTEES PAR LA DELEGATION JAPONAISE

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ARTICLES 3 & 4–

Il ne ressort pas clairement du texte, en particulier de l'article 4, si la mention de la clause concernant la responsabilité du transporteur est obligatoire, ainsi qu'il est disposé à l'article 17 pour les marchandises. La Délégation Japonaise pense que cette mention devrait être obligatoire.

ARTICLE 4–

Il conviendrait également de toujours inscrire la mention g) relative à la délivrance des bagages.

Excerpts from R. Horner & D. Legrez,
Second Internationa l Conference on Private Aviation Law, Minutes (1975)

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[page 269] **PROPOSALS OF AMENDMENTS SUBMITTED TO THE WARSAW CONFERENCE**

preceeded by the report
of the preparatory committee
instituted by the conference.

A.
PREPARATORY COMMITTEE

Proposals on the Order of Discussion

The committee, after having analyzed the various amendments presented by the different delegates, has deemed it opportune to retain in the first place the amendments touching questions relating to the very essence of the draft of the Convention and for which certain delegates would eventually have to ask instructions from their Government.

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[page 270] **Analysis of the Amendments**

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[page 272] **Article 3**

Paragraph 1:

Polish proposal. [Question of substance (2).]

Letter (c): German, British and Hungarian proposal. [Question of substance (2).]

Letter (d): Italian proposal. [Question of wording.] German and British proposal. [Question of substance (2).]

Letter (e) additional: German and Czechoslovakian proposals, (cost of carriage). [Question of substance (2).]

Letter (f) additional: Polish and Brazilian proposal (indication of the traveler). [Question of substance (2).]

Paragraph 4:

Japanese proposal with regard to the last paragraph of Article 4 – It shall be necessary to take up the same general wording formula.

Greek proposal (sanctions). [Question of substance (2).]

German proposal. [Question of wording.]

Article 4

Paragraph 4:

Letter (a): British proposal (elimination). [Question of substance (2).]

Letter (c): British, German and Hungarian proposal (elimination). [Question of substance (2).]

Letter (d): Italian proposal. [Question of wording.] German proposal (elimination). [Question of substance (2).]

Letter (f): British proposal (elimination). [Question of substance (2).]

Letter (h) additional: Swiss and German proposals (addition of the number of parcels, etc. . .). [Question of substance (2).]

Letter (i) additional: German proposal (interest in the delivery). [Question of substance (2).]

Letter (l) additional: German and Czechoslovakian proposal (cost of carriage). [Question of substance (2).]

Paragraph 5:

German proposal. [Question of wording.]

Last paragraph:

Japanese proposal (see Article 3, last paragraph).

Second Japanese proposal (compulsory particulars). [Ques[page 273]tion of substance (2).]

Swiss proposal (new compulsory particulars). [Question of substance (2).]

Greek proposal (see Article 3). [Question of substance (2).]

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[page 283]

B.
PROPOSALS OF THE DELEGATIONS

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[page 303]

GREEK REPUBLIC

Article 3 – Section 4

Conforming to Article 22 of the draft, in the case of an accident, the carrier can escape his liability if he proves that he and his servants have taken reasonable measures to avoid the damage, or that it was impossible for them to take them.

However, according to Article 3, the carrier loses this advantage if the passenger ticket does not contain the particulars indicated in this article.

It is possible, in effect, that by simple negligence the carrier has omitted to mention in the passenger ticket the place of issuance, or the point of departure, or his name and address; or even that he keep his former address in the ticket, or finally he does not point out an intermediate stop.

These are, in general, omissions without great importance for the party, because it is known or easy to establish that the ticket was issued and the departure took place from the aerodrome of such and such a city, that the aircraft is owned by such company, or because the intermediate stop can be without interest for the contracting party.

One can wonder why such an omission, without importance for the majority of cases, should lead to such a serious sanction in every case as that provided for by Article 3, paragraph 4.

If the omission is without interest for the other party, and if it causes him no damage, how could one justify this severe sanction on the shoulders of the carriers?

This sanction is justified only in the case where the omission of a particular would have engendered damage to the passenger, as it can happen in certain circumstances.

But who will judge if there is damage to the other contractant because of this omission and if the damage is such that the carrier must be made to lose the option of escaping by proof that he had done what is necessary to avoid the accident? Naturally there is only the court, seized with the affair who would be able to judge this question.

It's for these reasons that we propose to modify paragraph 4 of Article 3 of the draft as follows:

[page 304] "If, for international carriage, the carrier accepts a traveler without having made out a passenger ticket, the contract of carriage shall nonetheless be subject to the rules of the present Convention, but the carrier shall not have the right to avail himself or the provisions of this Convention which exclude in all of in part his direct liability or that derived from the errors of his servants.

"If the passenger ticket does not contain one of the particulars hereabove, the carrier shall be deprived of this

right in the case where, according to the judgment of the court, damage would be caused to the other party by this fact."

For the same reasons one should modify in the same sense paragraph 7 of Article 4 for the baggage check and Article 17 for the waybill.

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[page 310] **JAPAN**

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Articles 3 and 4

It's not clear from the text, in particular from Article 4, if the particular of the clause concerning the liability of the carrier is compulsory, as it is provided for in Article 17 for goods. The Japanese Delegation thinks that this particular should be compulsory.

Article 4

It would be advisable as well to insert always particular (g) relating to delivery of baggage.

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